

No. 12653

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United States  
Court of Appeals  
For the Ninth Circuit.

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OAKLAND DOCK AND WAREHOUSE COM-  
PANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

FILED

JAN 11 1951

PAUL R. DERRICK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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San Francisco, California.

In the United States District Court for the Northern  
District of California, Southern Division

Civil Action No. 29820

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COM-  
PANY,

Defendant.

### COMPLAINT

The United States of America, by Frank J. Hennessy, United States Attorney for the Southern District of California, complains of the defendant and alleges:

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345.

2. Defendant Oakland Dock and Warehouse Company is a corporation duly organized and existing under the laws of the State of California with its principal place of business at 1401 Middle Harbor Road, Oakland, California.

3. By bill of sale dated June 1, 1949, plaintiff, acting through War Assets Administration, an agency of the United States, in the exercise of the powers vested in it by Reorganization Plan One of 1947 (12 F.R. 4534), and the Surplus Property Act of 1944, as amended (Act of October 3, 1944, 58 Stat. 765, as amended, 50 App. U.S.C. 1611, et

seq.), and in accordance with the provisions of the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225), sold, transferred, assigned and delivered to defendant certain industrial equipment, machine tools and tools, described in said bill of sale, upon the covenants, restrictions, conditions and reservations set forth in said bill of sale, including, among others, the following:

“1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant,’ in which the above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

“2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years’ duration each.

“3. The Vendee for a period of ten (10) years from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other



severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of those machine tools or other severable production equipment as listed in Exhibit 'G' of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule 'A' and made a part hereof."

A copy of said bill of sale, together with "Schedule A" attached thereto, is marked Exhibit 1 and is attached to this complaint.

4. Defendant accepted delivery and acquired title to said personal property subject to all the covenants, conditions, restrictions and reservations set forth in said bill of sale.

5. Prior to the execution of said bill of sale, said personal property had been designated by letter dated May 7, 1948, to the War Assets Administration from the Director for Industrial Programs, Munitions Board of the National Military Establishment, as necessary for the national defense to be disposed of under the national security clause. A copy of said letter is marked Exhibit 2 and is attached to this complaint. By the terms of the National Industrial Reserve Act of 1948 said per-



sonal property is a part of the national industrial reserve.

6. Defendant, notwithstanding the covenants, restrictions, conditions and reservations set forth in said bill of sale and in violation of the terms thereof, has sold and disposed of certain of said machine tools and items of industrial equipment to third persons without the written consent of the Secretary of the Navy (the Navy Department being the department which has jurisdiction over said personal property); and defendant will, unless restrained by order of this Court, sell and dispose of additional items of said machine tools and industrial equipment. The machine tools and items of industrial equipment already sold and disposed of by defendant and which will be sold and disposed of by defendant unless restrained by order of this Court did not and will not consist of those machine tools and items of equipment listed in "Schedule A" attached to said bill of sale. The sale and disposition of such machine tools and items of industrial equipment by defendant has already materially reduced the capacity of the plant to produce the items for which it was designed, and the further sale and disposition of additional machine tools and items of industrial equipment which defendant will undertake, unless restrained by order of this Court, will further materially reduce the capacity of the plant to produce the items for which it was designed. Defendant has not, does not propose to, and will not make replacement of equivalent machine tools and items of industrial equipment in

lieu of those which defendant has sold and disposed of and which defendant will sell and dispose of unless restrained by order of this Court.

7. The sale and disposition by defendant of said machine tools and items of industrial equipment will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948.

Wherefore Plaintiff prays:

(1) That this Court issue a temporary restraining order restraining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale (other than the items of personal property listed in "Schedule A" attached to said bill of sale) without the written consent of the Secretary of the Navy.

(2) That this Court issue a preliminary injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale (other than the items of personal property listed in "Schedule A" attached to said bill of sale) without the written consent of the Secretary of the Navy.

(3) That this Court issue a permanent injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale (other than the items of

personal property listed in "Schedule A" attached to said bill of sale) without the written consent of the Secretary of the Navy.

(4) That defendant be required to pay to plaintiff such damages as plaintiff has sustained from defendant's wrongful sale and disposition of items of personal property acquired by defendant under said bill of sale.

(5) That plaintiff have such other and further relief as is just.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ ROBERT H. PECKHAM,  
Assistant United States  
Attorney.

(Here follows Schedule "A," part of Exhibit 1-15 photostat pages.)

EXHIBIT No. 1

Moore Drydock Co.  
Oakland, Calif.  
M-Calif-174

Bill of Sale

For and in Consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, and other good and valuable considerations, receipt of which are hereby acknowledged, and the covenants, restrictions, conditions and reservations hereinafter contained, the United States

of America, acting by and through War Assets Administration under and pursuant to Reorganization Plan One of 1947 (12 F. R. 4534) and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765) and WAA Regulation No. 1 as amended, Vendor, does hereby sell, transfer, assign and deliver unto Oakland Dock and Warehouse Company, a corporation duly organized and existing under the laws of the State of California, Vendee, the following described chattels:

All that certain personal property located on that portion of the Moore Drydock Company West Yard, Oakland, California, comprising 52.69 acres, more or less, as owned by the United States of America and conveyed to Vendee by quitclaim deed of even date, the same being more specifically described in WAA-4 Folders Numbered 1, 2, 2a, 3, 3a, 4, 5, 6, 7, 8, 9, 10, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 12, 13, 14, 15, 16, 17, 18, 19, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9, 21, 22-1, 22-2, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8, 22-9, 23, 24, 25, 26, 27 and 28.

Said chattels were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and WAA Regulation No. 1 as amended.

To Have and to Hold the same unto the said Vendee, its successors and assigns, without representation of warranty, express or implied, as to the

title or condition thereof, subject to the following covenants, restrictions, conditions and reservations:

1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the "plant," in which the above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each.

3. The Vendee for a period of ten (10) years from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of these machine tools or other



severable production equipment as listed in Exhibit "G" of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule "A" and made a part hereof.

4. The Vendee, for said period of ten (10) years, will preserve, protect and maintain the machinery, machine tools and equipment as hereinabove described, in said plant in the same condition of repair in which they are received by Vendee, and Vendee may move any machinery, machine tools and equipment as hereinabove described from their present locations or foundations within the plant and store in other parts of said plant or in wooden structures on the property, included therein, and it is agreed that machinery, machine tools and equipment which are not readily severable may be so moved by Vendee, by dismantling and so storing in their severable parts. It is further agreed that parts rendered worthless in such dismantling operations, such as brick work, may be scrapped and that foundations may be removed. It is understood that there will be some unavoidable aging of the machinery, machine tools and equipment placed in such storage and that the machinery, machine tools and equipment used by the Vendee will be subject to reasonable wear and tear, and the above provision relative to maintenance in the condition received by Vendee is so qualified. Subject to the foregoing provisions, the Vendee will so preserve, protect and maintain said machinery, machine tools and equipment as above

prescribed that the same can be put into efficient operation for their intended defense use in the shortest possible time, but in no case in excess of one hundred and twenty (120) days.

5. The Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which has the jurisdiction, shall have the right to conduct an inspection or survey of said machinery, machine tools and equipment at any time upon prior written notice thereof to the Vendee.

6. When, in the opinion of the appropriate Secretary, the Vendee fails to comply with the obligations prescribed herein, the Vendor shall have the right to take full possession of said machinery, machine tools and equipment, and to take such action as may be necessary to remedy the Vendee's default. All costs incidental to taking possession of said machinery, machine tools and equipment under these circumstances and of the work performed or action taken under the direction of the Vendor, shall be borne by the Vendee. Upon completion of such work, possession of said machinery, machine tools and equipment will be returned to the Vendee, unless in the interim the Vendor shall have activated the dormant estate mentioned above.

Vendee herein has certified, and by acceptance of this bill of sale agrees for itself, its successors and assigns that it has received delivery of all of the chattels as hereinabove described.

In Witness Whereof, Vendor has caused this

instrument to be executed this first day of June, 1949.

UNITED STATES OF  
AMERICA,

Acting by and Through War  
Assets Administration.

By /s/ ROBERT B. BRADFORD,  
Regional Director, Region 10, San Francisco,  
California.

State of California,  
City and County of San Francisco—ss.

On this 21st day of June, 1949, before me, Maude C. Phelps, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Robert B. Bradford, known to me to be the Regional Director, War Assets Administration, Region 10, San Francisco, California, and known to me to be the person who executed the within instrument on behalf of said War Assets Administration, which executed said instrument on behalf of the United States of America, and acknowledged to me that he subscribed to the said instrument the name of the United States of America and the name of the War Assets Administration on behalf of the United States of America, and further that the United States of America executed said instrument.



Witness my hand and Official Seal.

[Seal]     /s/ MAUDE C. PHELPS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Sept. 21, 1952.

EXHIBIT No. 2

National Military Establishment  
Munitions Board  
Washington

Refer to  
MB 004

7 May 1948

Mr. Marshall L. Godman  
Deputy Administrator  
Office of Real Property Disposal  
War Assets Administration  
Washington 25, D. C.

Dear Mr. Godman:

Reference is made to a directive issued by Doctor Steelman, on April 8, 1948, suspending the sale of industrial facilities in your inventory for thirty days during which time the Military Establishment was to check these facilities to determine whether or not any of them should be disposed of under the terms of the National Security Clause.

There is attached hereto a tentative list of one hundred fourteen facilities now considered necessary for the National Defense, and, as a conse-

quence, should be disposed of under the National Security Clause conditions. Studies are continuing with regard to the facilities on this tentative list and it is anticipated that within approximately thirty days certain deletions may be possible. The Military Departments expect to conduct field checks on the physical condition of most of these facilities; therefore, it is requested that your field organization be asked to cooperate by permitting them to make a physical inspection of these properties.

Sincerely yours,

/s/ P. W. TIMBERLAKE,

Major General, USAF.

1 Incl:

List of plants

(6 pages)

Plants to Be Added to the National Security  
Clause List

4 May 1948

Continental Foundry and Machine Company

Coraopolis, Pennsylvania (RFC-owned, Plan-  
cor 294)

Denver Ordnance Plant

Denver, Colorado (Army)

Scullin Steel Company

St. Louis, Missouri (RFC-owned, Plancor 1672)

Utah General Sub-Depot

(Utah Ordnance Plant), Salt Lake City, Utah  
(Army)

Huntsville Arsenal

Huntsville, Alabama

Symington-Gould Corporation

Army-owned, Depew, New York

Revere Copper & Brass Company

Plancor 91, Chicago, Illinois

Aircraft Service Corporation

Valley Stream, L. I., New York

Air Reduction Sales Company, Inc.

Gloucester, New Jersey

Aluminum Company of America

Riverbank, California

Aluminum Company of America

Heath (Newark), Ohio

Atlantic Steel Casting Company

Crum Lynn, Pennsylvania

Curtiss-Wright Corporation

Kenmore, New York

Emerson Electric Mfg. Company

St. Louis, Missouri

Farm Crop Processing

Omaha, Nebraska

Grain Processing Corporation

Muscatine, Iowa

Howard Foundry Company

Chicago, Illinois

Mohawk Petroleum

Bakersfield, California

National Distillers Products

Kansas City, Missouri

National Smelting Company

Cleveland, Ohio

Northwestern Aeronautical Corporation

St. Paul, Minnesota

Pesco Products, Inc.

Cleveland, Ohio

Republic Aircraft Products Div.

Detroit, Michigan

Sealed Power Corporation

Muskegon, Michigan

Solar Aircraft Company

Des Moines, Iowa

Standard Oil Company of N. J.

Baton Rouge, Louisiana, 1065

Standard Oil Company of N. J.

Baton Rouge, Louisiana, 1526

Standard Oil Company of N. J.

Baton Rouge, Louisiana, 1868

Studebaker Corporation

Chicago, Illinois

Timkin Roller Bearing Company

Columbus, Ohio

Waco Aircraft Company  
Troy, Ohio

Willamette Valley Wood Chemical Co.  
Eugene, Oregon

Wilshore Oil Company  
Norwalk, California

Wright Aeronautical Company  
Paterson, N. J. (South Portion)

Air Reduction Sales Co., Inc.  
Baltimore, Maryland. Plancor 1400

Alabama Drydock & Shipbuilding Co.  
Mobile, Alabama. Nobs-77

Aluminum Company of America  
Maspeth, New York. Plancor 226-A1

Aluminum Company of America  
Trentwood, Washington. Plancor 524, Plancor 1061

Aluminum Company of America  
McCook (Chicago), Illinois. Plancor 652

Aluminum Company of America  
New Castle, Pennsylvania. Plancor 1148-1 (F-9)

Aluminum Company of America  
Kansas City, Missouri. Plancor 1214

American Cyanamid Chemical Corp.  
Fort Worth, Texas

Asbestos Limited, Inc.  
Millington, New Jersey

Associated Shipbuilders

(Formerly Puget Sound Br. & Dredg.), Seattle,  
Washington

Barium Stainless Steel Company

Lorain (Canton), Ohio. Plancor 709

Barnes, W. F. & John (Bldg. #31)

Rockford, Illinois. Plancor 67

Bendix Aviation Corporation

(Plants 4 and 5), Plancor 14, South Bend,  
Indiana

Bendix Aviation Corporation

Teterboro, New Jersey. Plancor 132

Bendix Aviation Corporation

South Bend, Indiana. Plancor 171

Benjamin Franklin Graphite Co.

Chester Springs, Pennsylvania. Plancor 1254

Bethlehem Fairfield Shipyard

Baltimore, Maryland. MC-10676

Buffalo Brake Beam Company

Buffalo, New York. Plancor 1773

Charleston Shipbuilding & Drydock

Charleston, South Carolina. Nobs-6

Columbia Broadcasting Company

Delano, California. Plancor 1985

Commercial Iron Works

Portland, Oregon. Nobs-75 and 489

Consolidated Steel Corporation

Wilmington, California. MC



Consolidated Steel Corporation

San Francisco, California. NOd-1780, MC-10605

Copperweld Steel Company

Warren, Ohio. Plancor 333.

Copperweld Steel Company

Warren, Ohio. Plancor 334

Copperweld Steel Company

Warren, Ohio. Plancor 383

Copperweld Steel Company,

Warren, Ohio. Plancor 1130

Crucible Steel Company of America

Midland, Pennsylvania. Plancor 466

Delta Shipbuilding Company

New Orleans, Louisiana. MC-45024

Domestic Manganese & Dev. Co.

Butte, Montana. Plancor 1804

Dow Chemical Company

Bay City, Michigan. Plancor 988

DuPont de Nemours & Co., E. I.

Leomister, Massachusetts. Plancor 1273

Eagle Pitcher Mining & Smelting Co.

Henryetta, Oklahoma. Plancor 1023

Eaton Manufacturing Company

Saginaw, Michigan, Plancor 787

Eaton Manufacturing Company

Cleveland, Ohio. Plancor 800

Electric Auto Lite Company

Cincinnati, Ohio. Nord 1229

Fairchild Engine & Aircraft Corp.

(Firestone Tire & Rubber Co.) Pl. 506. Burlington, North Carolina

General American Transportation Corp.

(Jacksonville Oil Terminal) Pl. 1595-A. Jacksonville, Florida

General Cable Corporation

Perth Amboy, New Jersey. Plancor 735

General Motors Corporation

Kings Mills, Ohio. NObs 1599

Globe Union, Inc.

Milwaukee, Wisconsin. Nobs 59

Goodyear Synthetic Rubber Corp.

Akron, Ohio. Plancor 126

Hegeler Zinc Company

Hegeler, Illinois. Plancor 971

Hughes Tool Company

Houston, Texas. Plancor 143

Hurley Marine Works, Inc.

Oakland, California. NObs-723

Jack Heinz, Inc.

Bedford, Ohio. Plancor 114

Jack & Heinz Inc.

Bedford, Ohio. Plancor 1188

Jones Construction Co., J. A.

(Wainwright Shipyard), MC-45021. Panama City, Florida



Kaiser Shell Plant

Fontana, California

Kaiser Swan Island Shipyard

Portland, Oregon. MC-70602

Keuffel & Esser Company

Hoboken, New Jersey, NOrd-1023

Marietta Manufacturing Company

Point Pleasant, W. Virginia. NObs-387

Marin Shipbuilding Company

Sausalito, California. MC-70583

McDonnell Aircraft Corporation

Memphis, Tenn. Plancor 813

Moore Drydock Company

Oakland, California. MC-70588

National Carbide Corporation

Ashtabula, Ohio. Plancor 1166

National Supply Company

Toledo, Ohio. NObs-419

New England Shipbuilding Corp.

South Portland, Maine. MC-10801

Ohio Steel Foundry Company

Lima, Ohio. Plancor 875

Oregon Shipbuilding Corp.

Portland, Oregon. MC

Otis Elevator Company

Buffalo, New York. WD-332

Pendleton Shipyard Company

New Orleans, Louisiana. NObs-1096

- Pittsburgh Steel Foundry Company  
Glassport, Pennsylvania. Plancor 659
- Pullman Standard Car Mfg. Co.  
Chicago, Illinois. Plancor 104
- Pullman Standard Car Mfg. Co.  
Chicago, Illinois. Plancor 391
- Republic Steel Corporation  
Warren, Ohio. Plancor 1514
- Scullin Steel Company  
St. Louis, Missouri. Plancor 299
- Sun Shipbuilding & Drydock  
Chester, Pennsylvania. MC-10835
- Todd Houston Shipbuilding Corp.  
Houston, Texas. MC-40523
- U. S. Rubber Company  
Los Angeles, California. Plancor 611-A
- Victoreen Instrument Company  
Cleveland, Ohio. Plancor 1975
- Warner Company  
Devault, Pennsylvania. Plancor 1238
- Wenatchee Alloys, Inc.  
Wenatchee, Washington. Plancor 747
- Westinghouse Electric & Mfg. Co.  
Landsdowne, Maryland. Plancor 474
- Willamette Iron & Steel Company  
Portland, Oregon. Plancor 50
- Willamette Iron & Steel Company  
Portland, Oregon. Plancor 772

Willamette Iron & Steel Company  
Portland, Oregon. Plancor 1956

Willys Overland Motors Company  
Toledo, Ohio. Plancor 383

Wyman-Gordon Company  
Worcester, Mass. Plancor 715

Youngstown Sheet & Tube Company  
Indiana Harbor, Indiana. Plancor 328

### War Assets Administration

#### Memorandum

Following is the text of a statement issued by  
the Assistant to the President on April 8, 1948:

April 8, 1948

(Copy)

Immediate Release

#### Statement by the Assistant to the President

After consultation with the Secretary of Defense, the Chairman of the National Security Resources Board, the Chairman of the Munitions Board, and the Administrator of the War Assets Administration, I have requested the War Assets Administration to withhold for a thirty-day period final disposal action on all unsold industrial plants, including machine tools and other production equipment therein, not already covered by the National Security Clause. The National Security Clause is a condition of sale contract which stipulates that the plant must be maintained in condition such that it

can be reconverted to its original use on 120 days notice.

Under the provisions of Public Law 364, the Munitions Board has imposed the National Security Clause on more than 150 plants. The plants selected were those considered most important for national defense purposes. The purpose of the present action is to permit the Munitions Board to review the status and condition of each of the remaining, unsold plants with a view to imposing the restrictions of the National Security Clause on subsequent sales where appropriate under current conditions.

Some of these plants have long since been cannibalized (i.e., sold piece by piece to different buyers) or have otherwise deteriorated to the point where it would not be practicable to impose the National Security Clause. In the case of other plants which are in reasonably good condition, the Munitions Board may determine that it is not desirable or necessary to impose the National Security Clause. In some cases however, the clause will be imposed.

In this review of the status and condition of these plants, top priority will be given to plants where negotiations for disposal are in an advanced stage. In all cases, the War Assets Administration will continue negotiations but will refrain from final disposal action until a determination with respect to the plant is made by the Munitions Board during this thirty-day period.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT  
OF TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE

The Secretary of Defense has the authority to designate, as part of the National Industrial Reserve, plants which are to be disposed of as surplus property.

The National Industrial Reserve is defined as "that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a national security clause, \* \* \*."

Section 3(a) of the National Industrial Reserve Act of 1948, PL 883, 80th Congress, active July 2, 1948, 62 Stat. 1225.

The national security clause is defined as those terms, conditions, restrictions, and reservations, heretofore formulated or as may be formulated for insertion in instruments of sale or lease of property determined to be a part of the national industrial reserve, which will guarantee the availability thereof for such purposes as deemed necessary by the Secretary of Defense.

Section 3(c) of the National Industrial Act of 1948 as cited above.

The authority of the Secretary of Defense under the National Industrial Act has been delegated to the Munitions Board.

Memorandum for the Chairman of the Munitions Board dated July 3, 1948.

Any sale, or offer to sell a plant, its equipment or machinery by a purchaser from the government under a bill of sale containing a national security clause is in violation of the provisions of the National Industrial Reserve Act unless the written consent of the Secretary of Defense or the secretary of the appropriate branch of the armed services is first obtained.

The National Industrial Reserve Act of 1948 as cited above.

Any sale of a plant or its equipment or material in the industrial reserve without the written consent of the appropriate secretary of the department of defense will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948.

Respectfully submitted,

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Plaintiff.



[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF APPLICATION  
FOR TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY INJUNC-  
TION

United States of America,  
State and Northern District of California,  
City and County of San Francisco—ss.

John Rauly, being first duly sworn, deposes and says:

I am the Assistant to the Deputy Assistant Industrial Manager, Captain Mario Vangeli, of the Bureau of Ships, Department of the Navy, assigned to the Field Office of the Bureau of Ships at San Francisco, California. It is the duty of the field office of the Bureau of Ships to conduct inspections of industrial reserve plants designated as such by the Munitions Board of the Department of Defense and located in the San Francisco Bay Area.

The Oakland Dock and Warehouse plant, formerly the Moore Drydock West Yard, located at Oakland, California, is one of the industrial reserve plants within the San Francisco Bay Area. This plant, a shipyard, was originally sponsored by the United States Maritime Commission, and during the war the Moore Dry Dock Company constructed various types of vessels therein. At the end of the war, the plant and its equipment and machinery was declared surplus by the Maritime Commission and turned over to the Surplus Prop-

erty Administration, later the War Assets Administration, for disposal. By letter dated May 7, 1948, from Major General P. W. Timberlake, Director for Industrial Programs, Munitions Board, a copy of which is annexed to the complaint filed herein and served herewith as Exhibit 2, the War Assets Administration was informed that this plant, its equipment and machinery, was to be disposed of subject to the National Security Clause. (Sec. 3(c) of National Industrial Reserve Act of 1948 P.L. 883, 80th Congress.) The Annual Reports of the Munitions Board to Congress on the National Industrial Reserve, dated April 1, 1949, and April 1, 1950, shows the Moore Dry Dock West Yard as in the National Industrial Reserve (1949 Report, page 102; 1950 Report, page 101). Section 3(a) of the above cited National Industrial Reserve Act defines the term "national industrial reserve" to mean that excess industrial property which has been sold, leased, or otherwise disposed of by United States, subject to the National Security Clause.

The War Assets Administration has sold to Oakland Dock and Warehouse Company, defendant herein, certain industrial equipment, machine tools and tools, described in the bill of sale annexed to the complaint filed herein and served herewith as Exhibit 1, upon the terms, conditions and reservations set forth in the said bill of sale. These terms, conditions and reservations (Page 3 to 6 of the bill of sale) set forth various restrictions on the machinery and equipment under the National Security Clause.



Paragraph No. 3 of the restrictions set forth in the said Bill of Sale states that the purchaser for a period of ten years from the date of the bill of sale will not, without the written consent of the Secretary of the Navy, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described in said bill of sale, the loss of which would materially reduce the capacity of the plant to produce the items for which it was made unless replacement is made by equivalent machine tools or other severable production equipment.

Notwithstanding the restrictions contained in paragraph 3 of said Bill of Sale, the defendant has sold and disposed of certain of said machine tools and items of industrial equipment to third persons without the written consent of the Secretary of the Navy. In a letter of William H. Neblett, dated May 26, 1950, to the Assistant Secretary of the Navy, Washington, D. C., Mr. Neblett, as attorney for the defendant, states on page 1 that machine tools and equipment were being sold by the defendant and that "since May 4th the company has sold some additional equipment which was released by the General Services Administration on May 8, 1950." Affiant is informed and believes that the defendant will sell and dispose of additional items of said machine tools and industrial equipment. The defendant has widely publicized and advertised the sale of items of machinery, equipment and tools included in the bill of sale and subject to the restrictions of paragraph 3 thereof in

the public press. (San Francisco Chronicle of May 24, 1950, World Trade Supplement, at page 17, and San Francisco Examiner of May 14, 1950.) On Page 3 of the said letter from William H. Neblett to the Assistant Secretary of the Navy, Mr. Neblett states: "Until these well established points of law applicable to bills of sale and chattel mortgages have been answered satisfactorily to us, we shall proceed with the sale of such machinery, tools and equipment as we desire to sell."

The machine tools and items of industrial equipment already sold and disposed of by defendant, and which affiant is informed and believes will be sold and disposed of by defendant unless restrained by order of this Court, has already materially reduced the capacity of the plant to produce the items for which it was designed, and further sale and disposition of additional machine tools and items of industrial equipment, which affiant is informed and believes defendant will undertake unless restrained by order of this Court, will further materially reduce the capacity of the plant to produce the items for which it was designed.

The machine tools and items of industrial equipment already sold and disposed of by defendant, and which affiant is informed and believes will be sold and disposed of by defendant unless restrained by order of this Court, are subject to the restrictions of paragraph 3 of the Bill of Sale as set forth above.

/s/ JOHN RAULY.

Subscribed and sworn to before me this 8th day of June, 1950.

/s/ LOUIS N. DESMOND.

[Seal of the District Court.]

[Endorsed]: Filed June 8, 1950.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 29820

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COM-  
PANY,

Defendant.

TEMPORARY RESTRAINING ORDER AND  
ORDER TO SHOW CAUSE

Upon the reading of the affidavit of John Rauhy, Assistant Industrial Manager of the Bureau of Ships of the Department of the Navy, and the points and authorities filed herewith, and it appearing therefrom that this is a proper case for the issuance of a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint be granted, great and irreparable injury will result to plaintiff, as hereinafter

set forth, before the matter can be heard on notice; and

It appearing that the defendant, notwithstanding the restrictions contained in paragraph 3 of the Bill of Sale annexed to the complaint on file herein, will, unless restrained by order of this Court, sell and dispose of additional items of machine tools and industrial equipment located at the Oakland Dock and Warehouse Company plant, Oakland, California, in violation of the National Security Clause contained in said Bill of Sale, pursuant to Section 3-c of the National Industrial Reserve Act of 1948 (Public Law 883, 80th Congress); and

It further appearing that the sale and disposition of such machine tools and items of industrial equipment by the defendant, unless restrained by order of this Court, will further materially reduce the capacity of the said plant, which has been designated by the Munitions Board of the Department of the Defense of the United States as an industrial reserve plant, to produce the items for which it was designated; and

It further appearing that the sale and disposition by defendant of machine tools and items of industrial equipment listed in said Bill of Sale will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225);

It Is Therefore Ordered, that pending the hearing on the hereinafter mentioned order to show cause, the defendant, their agents, servants, employees,

lessees and attorneys, collectively and individually, and all persons having knowledge of this order, and each of them, are enjoined and restrained and ordered as follows:

(1) From selling, delivering, contracting to sell, offering to sell, or otherwise disposing of any of the personal property acquired by plaintiff under said Bill of Sale (other than the items of personal property listed in "Exhibit G" of "Schedule A," attached to said Bill of Sale, annexed to the complaint on file herein) without the written consent of the Secretary of the Navy;

(2) From completing any sales herinbefore commenced of the said personal property acquired by defendant under said Bill of Sale, and from executing and delivering any Bill of Sale to any purchaser for the purchase of any property listed in the said Bill of Sale annexed to the complaint on file herein, other than items mentioned in "Exhibit G" of "Schedule A."

It Is Further Hereby Ordered, for the reasons above set forth and for the further reason that this temporary restraining order has been granted without prior notice of the motion therefor, that the same shall expire at the hour of 12:00 p.m. on the 16th day of June, 1950, unless prior thereto, for good cause shown, this order is extended in accordance with the provisions of Rule 65, Subdivision (b) of the Federal Rules of Civil Procedure.



It Is Further Ordered, that the defendant hereinabove named be and appear before this Court on the 16th day of June, 1950, at the hour of 10:00 a.m., then and there to show cause, if any they have, why they, their agents, servants, lessees, attorneys and employees, should not be enjoined and restrained and ordered, during the pendency of this action, from doing any of the acts and things hereinabove mentioned and complained of in plaintiff's said complaint, in accordance with the prayer thereof.

Dated: June 8th, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed June 8, 1950.

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[Title of District Court and Cause.]

### ANSWER

Now comes the defendant, Oakland Dock and Warehouse Company, and for its answer to the complaint herein, admits, denies and alleges, as follows:

#### I.

For its answer to Paragraph 3 of the complaint defendant admits all of the allegations therein except that it denies that the Bill of Sale was made or that the property described therein was sold, transferred, assigned or delivered to it in accord-



ance with the provisions of the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Statute 1225); defendant denies that the Government made a conditional sale of the chattels described in the Bill of Sale to defendant; on the contrary, defendant alleges that the Government by said Bill of Sale made an absolute transfer of all its right, title and interest in and to the chattels to the defendant.

## II.

For its answer to Paragraph 4 of the complaint defendant denies that there are any covenants, conditions, restrictions or reservations set forth in the Bill of Sale which in any way affect or limit the absolute title to the chattels transferred to it.

## III.

For its answer to Paragraphs 5, 6 and 7 of the complaint defendant denies generally and specifically each and every allegation contained therein.

Wherefore, defendant having fully answered the complaint herein, prays that the complaint be dismissed and that it go hence with its costs incurred herein.

/s/ WILLIAM H. NEBLETT,  
Attorney for Defendant.

District of Columbia—ss.

Jules J. Agostini, Jr., being by me first duly sworn, on his oath deposes and says:

That he is the President of Oakland Dock and Warehouse Company, a corporation, defendant

herein; that he makes this affidavit on behalf of said defendant; that he has read the foregoing Answer of defendant and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters, he believes the same to be true.

/s/ JULES J. AGOSTINI, JR.

Subscribed and Sworn to before me, a Notary Public in and for the District of Columbia, this 13th day of June, 1950.

[Seal]      /s/ LILLIAN C. HANABLE,  
Notary Public.

My Commission Expires February 14, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

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[Title of District Court and Cause.]

### MOTION TO DISMISS COMPLAINT

As a part of its response to the order to show cause herein, defendant will move the Court at 10:00 a.m., June 16, 1950, the time at which the order to show cause comes up for hearing, to dismiss the complaint herein. The grounds of the motion will be that:

1. The complaint does not, nor does any part

thereof, state a cause of action against the defendant.

2. The action is one sounding in damages when no damages are alleged in the complaint.

3. The complaint seeks an injunction to prevent an alleged breach of contract.

4. The complaint shows on its face that the machinery, tools and equipment described therein are excess industrial property but that they have not been designated by the Secretary of National Defense as a part of the Industrial Reserve.

5. The complaint shows on its face that the Secretary of Defense did not designate the excess industrial property described in the complaint for disposal subject to the provisions of the National Security Clause.

6. It appears from the complaint that the consent of the Secretary of Defense to bring this suit has not been given.

/s/ WILLIAM H. NEBLETT,  
Attorney for Defendant.

William H. Neblett certifies that in his opinion the foregoing motion is well taken and that it is **not interposed for delay.**

/s/ WILLIAM H. NEBLETT.

## Points and Authorities

## I.

The Secretary of Defense is the only officer authorized to determine what excess industrial property shall be placed in the National Industrial Reserve, or to designate what excess industrial property shall be disposed of subject to the provisions of the National Security Clause.

Section 4(1)(4) Public Law 883.

## II.

The Bill of Sale conveys all right, title and interest of the Government in the chattels to the defendant, vendee. The attempt in paragraph 3 of the Bill of Sale to impose a restraint on alienation is void.

California Civil Code, Section 711.

Murray vs. Green,

64 Cal. 363, 28 Pac. 118;

Barnell vs. McLaughlin,

173, Cal., 213, 159 Pac. 590;

Los Angeles Investment Co. v. Gary,

181 Cal., 680, 186 Pac. 596;

Title Guaranty & Trust Co. v. Garrott,

42 Cal. App. 152, 183 Pac. 470.

## III.

The property is in California; therefore, it is governed by the laws of that state.

Columbia Railway, Gas & Electric Co. v.  
South Carolina,

261 U. S. 238, 43 Sp. Ct. Rept. 306;

Fitzgerald v. County of Modoc,  
164 Cal., 494, 129 Pac. 794, 44 LRA (N.S.)  
1229;

Thompson v. Magnolia Pipe Line Co.,  
309 U. S. 476 60 Sp. Ct. Rep. 628;

Los Angeles and Salt Lake Ry. Co. v. U. S.,  
(CCA 9th Cir.) 140 Fed. 2d 438.

IV.

The Bill of Sale does not have a security clause.  
The sale of the machinery by the Government to  
the Vendee was a simple commercial transaction.

Section 3(c), Public Law 883.

Standard Oil Co. of N. J. vs. United States,  
267 U. S. 76, 69 L. Ed. 519.

/s/ WILLIAM H. NEBLETT,  
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

COUNTER-AFFIDAVIT OF JULES J. AGOSTINI, JR., IN REPLY TO AFFIDAVIT OF JOHN RAULY

District of Columbia—ss.

Jules J. Agostini, Jr., being first duly sworn, on his oath deposes and says that:

I.

Affiant is the President of defendant, Oakland Dock and Warehouse Company, hereinafter called Corporation, having been elected to that office by the Board of Directors of the Corporation May 10, 1949, and he makes this affidavit on behalf of the Corporation.

Affiant is 42 years old and was born in Berkeley, California, and has lived in California all his life; his residence is 2491 Ellsworth Street, Berkeley, California.

Affiant denies that Oakland Dock and Warehouse Company's property was formerly Moore Drydock, West Yard or that it is one of the Industrial Reserve plants; he denies that the plant is a shipyard or that it was originally sponsored as such by the United States Maritime Commission or that during the war Moore Drydock Company constructed various types of vessels therein; he denies that by letter dated May 7, 1948, from Major General P. W. Timberlake, USAF, Director of Industrial Programs, Munitions Board, copy of which is annexed to the complaint filed herein as Exhibit 2, the War



Assets Administration was informed that the personal property sold, transferred and delivered to the Corporation by the Bill of Sale dated June 1, 1949, attached to the complaint as Exhibit 1, was to be disposed of subject to the National Security Clause (Section 3(c) of the National Industrial Reserve Act of 1948, Public Law 883, 80th Congress); affiant denies that the annual reports of the Munitions Board to Congress on the National Industrial Reserve, dated April 1, 1949, and April 1, 1950, or either of them, show that the real or personal property sold, conveyed and delivered to the Corporation is, or are in the National Industrial Reserve; he denies that there are conditions or reservations set forth in the Bill of Sale which impose restrictions or restraints upon the absolute title to the machinery and equipment sold, transferred and delivered to the Corporation by the Bill of Sale.

Affiant admits that at his direction William H. Neblett, Counsel for the Corporation, wrote the letter dated May 26, 1950, referred to and quoted in part on Pages 3 and 4 of the affidavit of Mr. John Rauly, a true copy of which letter is as follows:

The Assistant Secretary of the Navy  
Navy Building  
Washington, D. C.

May 26, 1950

My dear Mr. Secretary:

Your telegram of May 25th, 251650Z, was received yesterday. Although it appears from Public Law 883, 80th Congress, and the Bill of Sale and Chattel

Mortgage dated June 1, 1949, that the Secretary of Defense is the only person authorized to make the demand which the Navy Department has made upon the Company in its two telegrams of May 20th and May 25th, the Company, as a matter of courtesy, is glad to furnish you with the information which you request in your second telegram.

Morgan v. U. S.,

298 U. S. 468, 56 Sup. Ct. 906;

Morgan v. U. S.,

304 U. S. 1, 58 Sup. Ct. 773.

You are mistaken when you say that the Department has no knowledge of any consent having been given by the Government for sale of the machinery, tools and equipment which the Company has sold. There have been seven (7) partial releases signed by General Services Administration, releasing from the chattel mortgage the machinery, tools and equipment described in the partial releases. Those releases were given by GSA with full knowledge that the machinery, tools and equipment released had been sold. Besides, frequent inspections have been made of the plant by the Navy Department. The inspecting representatives of the Navy then learned that machinery, tools and equipment were being sold. Three of these inspectors were Mr. Lally of the Bureau of Ships, Mr. Clark and Mr. Miller of the Twelfth Naval District. On May 5th, Mr. Rauly of the Industrial Management Division, Twelfth Naval District, called on Mr. Agostini, the President of the Company, at the Company's office

in Oakland, and was told that certain of the machinery, tools and equipment had been sold and released from the chattel mortgage and that the remainder of the chattels would be sold as and when the Company deemed their sale advisable. Mr. Rauly requested and was given at the time, copies of all of the partial releases made up to that time. They were six (6) in number, dated November 14, 1949, February 3, 1950, March 10, 1950, April 6, 1950, May 1, 1950, and May 4, 1950. Since May 4th the Company has sold some additional equipment which was released by GSA on May 8, 1950. A copy of that release is enclosed herewith. All seven of these releases were recorded in the County Recorder's Office, Alameda County, California. We are informed by GSA, San Francisco Regional Office, that in each case a copy of the release was forwarded by it to the Munitions Board, of which the Assistant Secretary of the Navy is a member.

You are in error when you say that the Company has been repeatedly informed that it is prohibited by the Bill of Sale from the sale of the machinery, tools and equipment. Neither the Company, nor any of its agents or attorneys have received any such information. We ask that you inform us of the names, dates and places when the Government claims that such information was given to the Company.

On the other hand, the Company did on September 7 and 9, 1949, inform, in writing, the Secretary of Defense, the Chairman of the Munitions Board, the Departments of Army, Navy and Air,

with numerous citations of authority to support its position, that there was no estate or interest in the machinery, tools and equipment reserved by the Government in its Bill of Sale to the Company. This information was repeated in writing more than a dozen times between September 9, 1949, and February 28, 1950. Because the Government failed to raise any objection to this stand of the Company's, naturally, it was assumed that the Government agreed with our construction of the Bill of Sale that it did not reserve any interest in the Government and did not prohibit the sale of the machinery, tools and equipment. This correspondence from the Company and the briefs which it filed on this subject are in the files of the several Departments of the Government mentioned. The only objection which the Navy Department raises in its telegrams to the sale of the machinery, tools and equipment is found in Paragraph 3 of the Bill of Sale. The Bill of Sale recites that the Government "does hereby sell, transfer, assign and deliver to the Oakland Dock & Warehouse Company" all of the machinery, tools and equipment therein described. The Bill of Sale was a transfer of complete title to the Company. The condition against alienation in Paragraph 3 is invalid.

"Conditions restraining alienation, when repugnant to the interest created, are void." California Civil Code, Section 711; see also Section 1441, California Civil Code.

The Government drew the Bill of Sale, executed



and delivered it to us. Concurrently, the Government required the Company to execute and deliver to it a Chattel Mortgage, drawn by the Government, on all of the machinery, tools and equipment, as security for the Note. Paragraph 9 of the Chattel Mortgage provides:

“9. Said Mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned chattels and that there are no liens or encumbrances or adverse claims of any kind whatever on the same or any part thereof.”

What is your construction of that Paragraph?

By acceptance of delivery of the Chattel Mortgage, the Government stated and declared that it had no interest or claim of any kind whatsoever on the machinery, tools and equipment, except the payment of the release price provided in Paragraph 3 of the Chattel Mortgage.

We are at a loss to know what the Navy Department means by the statement in its telegram that the “Government will hold you strictly accountable for any violations of this agreement,” because no violation of the agreement has been or can be shown. We are interested in knowing how the Government would go about holding the Company accountable. The Government cannot bring suit to quiet its title to the chattels; it has no title. The Government cannot foreclose the Chattel Mortgage because of the sale of some of the equipment, because the release price agreed upon has been paid and

releases have been given by the Government for all of the chattels so sold. The Government cannot bring suit for breach of covenant, because the covenant against resale is void under Section 711 of the California Civil Code. There is no reverter in the Bill of Sale; if a condition is broken, nothing happens. These propositions are all firmly established by the numerous decisions we have cited in our briefs filed with the Departments September 7 and 9, 1949. The property is in California; therefore it is regulated by California law.

Columbia Railway, Gas. & Electric Co. v.  
South Carolina,

261 U. S. 238, 43 Sp. Ct. Rept. 306;

Fitzgerald v. County of Modoc,

164 Cal., 494, 129 Pac. 794, 44 LRA (N.S.)  
1229;

Thompson v. Magnolia Pipe Line Co.,

309 U. S. 476, 60 Sp. Ct. Rep. 628;

Los Angeles and Salt Lake Ry. Co. v. U. S.,  
(CCA 9th Cir.) 140 Fed. 2d 43, 438.

Until these well established points of law applicable to the Bill of Sale and Chattel Mortgage have been answered satisfactorily to us, we shall proceed with the sale of such machinery, tools and equipment as we desire to sell.

Finally, we again mention the 7 releases of machinery, tools and equipment which have been given to us by the GSA, copies of all of which you now have. If the condition in Paragraph 3 of the Bill of Sale, or any other condition, had been valid, these



releases would be a waiver of them on the part of the Government.

California Civil Code, Sections 3515 and 3516. The releases are conclusive evidence of this waiver.

Section 203(d), Public Law 152, 81st Congress. Our attorney, Mr. Neblett, will be at the Washington Hotel in Washington next week. He will be glad to discuss this subject with you, if you will inform him of your convenience.

Respectfully yours,

WM. H. NEBLETT,

Attorney for Oakland Dock &  
Warehouse Co.

Enclosures:

Release dated May 8, 1950.

cc: Twelfth Naval District,  
San Francisco, California.

Affiant denies that the machine tools or items of industrial equipment already sold and disposed of by the Corporation, or those which will be sold and disposed of by it, has or will materially reduce the capacity of the plant to produce items for which it was designed and further denies that these items, or any of them, are subject to the restrictions of Paragraph 3 of the Bill of Sale, or any restriction whatsoever. No reply has been received from the Government to letter of Wm. H. Neblett of May 26, 1950, addressed to the Assistant Secretary of the Navy.

Affiant is informed that Mr. Neblett arrived in

Washington from California on June 1, 1950. In the afternoon of that day Mr. Stein, Counsel for the Bureau of Ships, Navy Department, telephoned and asked that he come to his office in the Navy Building the next day for an interview. Mr. Neblett went to Mr. Stein's office on the morning of June 2, and there saw and talked with Mr. Stein and Mr. Paisley, Assistant Counsel for the Navy. The conversation turned upon the proposal of Messrs. Paisley and Stein that the Company make an application to the Munitions Board to reform the Bill of Sale. After this discussion had continued for approximately two hours, Mr. Neblett was informed by Mr. Paisley that the Navy Department had referred the matter to the Department of Justice with a request that suit be immediately filed against the Company. Thereupon Mr. Neblett said there was no need for going on with the conference and that he would discuss the matter with the Department of Justice. Subsequently, and on June 7 and 8, 1950, Mr. Neblett interviewed Mr. Donald McGinness and Mr. Graham Morisson, in charge of this matter for the Department of Justice, concerning the request of the Navy made to the Attorney General's Office to file suit against the Company. While these discussions were in progress, the suit was filed June 8. During the discussions with members of the Attorney General's Office, Mr. Neblett delivered to Mr. McGinness and to Mr. Morisson separately certain memoranda of points and authorities of which the following are copies:

(Oakland Dock & Warehouse Co.  
Oakland, California.)

Restraints on Alienations are Invalid

Covenants, conditions and restrictions against the resale of property when title has been conveyed are universally held to be invalid. The rule is statutory in California.

California Civil Code, Section 711.

The Navy has objected to the sale of the chattels because of the restraint on alienation contained in Paragraph 3 of the Bill of Sale.

The restraint on alienation in Paragraph 3 is that none of the chattels may be sold or disposed of without the written consent of the Secretary. The restraint is not valid. It has been expressly so held by the Supreme Court in California on the ground that the restraint violates both the Civil Code Section 711 and the general common law principles. Such a restraint is invalid whether or not it is partial or general.

Murray vs. Green,

64 Cal. 363, 28 Pac. 118;

Barnell vs. McLaughlin,

173, Cal., 213, 159 Pac. 590;

Los Angeles Investment Company v. Gary,

181 Cal., 680, 186 Pac. 596;

Title Guaranty & Trust Co. v. Garrott,

42 Cal. App. 152, 183 Pac. 470.

The property being in California is governed by the laws of that state.

Columbia Railway, Gas & Electric Co. v.  
South Carolina, 261 U. S. 238, 43 Sp. Ct.  
Rept. 306;

Fitzgerald v. County of Modoc,  
164 Cal., 494, 129 Pac. 794, 44 LRA (N.S.)  
1229;

Thompson v. Magnolia Pipe Line Co.,  
309 U. S. 476, 60 Sp. Ct. Rept. 628.

The intention of the parties to the Bill of Sale must be ascertained from the Bill of Sale alone. Oral evidence is not admissible to show what that intention was. These principles are true although the United States is a party.

Los Angeles and Salt Lake Ry. Co. v. U. S.  
(CCA 9th Cir.) 140 Fed. 2d 438.

(Oakland Dock & Warehouse Co.  
Oakland, California.)

#### Waiver

~~Either party may waive the provision of Section 711 of the Civil Code.~~ If the conditions of the Bill of Sale had been valid, they would have been waived by the Government when it released from the chattel mortgage the numerous items of machinery, tools and equipment which had been sold. The Government at all times has had knowledge that the property which it so released had been sold prior to the time the releases were given.

“Any one may waive the provisions of a law or a contract for his benefit.”

California Civil Code,  
Sections 3268, 3513, 3515, 3516.

Patton v. Patton,

32 Cal. (2d) 520, 196 Pac. (2d) 909.

At the time the foregoing memoranda was handed to Messrs. McGinness and Morisson, Mr. Neblett also called their attention to Section 3423 (Fifth) of the California Civil Code, and each of them took down a reference to that section.

## II.

The Company purchased from the Government on June 1, 1949, the machinery, tools and equipment described in the Bill of Sale which is attached to the complaint as Exhibit 1. On the same date the Government conveyed to the Company by quitclaim deed, 52.9 acres of land upon which the machinery, tools and equipment were located. Attached hereto as Exhibit 1 and made a part of this affidavit is a copy of the quitclaim deed. The Company paid \$1,201,500 for the property; \$240,300.00 was paid in cash and the balance, \$961,200.00, was represented by a note payable in twenty (20) equal annual installments at 4% interest. This note is secured by a trust deed on the real property and a chattel mortgage on the machinery, tools and equipment. Attached to this affidavit as Exhibit 2 and made a part of it is a copy of the Chattel Mortgage. The 52.9 acres conveyed by the Government to the Company is only half of the shipyard known as the Moore Drydock, West Yard. The other half, lying to the east of the property of the Corporation, is on land belonging to Western Pacific Railroad



Company. On February 28, 1950, the Government modified the quitclaim deed as shown by a copy of it attached as Exhibit 3 and made a part of this affidavit.

/s/ JULES J. AGOSTINI, JR.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 13th day of June, 1950.

[Seal]      /s/ LILLIAN C. HANABLE,  
Notary Public.

My commission expires February 14, 1952.

/s/ WILLIAM H. NEBLETT,  
Attorney for Defendant, Oakland Dock & Warehouse Co.

## EXHIBIT No. I

### Copy

### Quitclaim Deed

This indenture, made this first day of June, 1949, between the United States of America, acting by and through War Assets Administration under and pursuant to Reorganization Plan One of 1947 (12 F. R. 4534) and the powers and authority contained in the provisions of the Surplus Property Act of 1944 (58 Stat. 765) as amended, hereinafter referred to as Grantor, and the Oakland Dock and Warehouse Company, a corporation duly organized and existing under and by virtue of the laws of



the State of California and having its principal office and place of business at Oakland, California, hereinafter referred to as Grantee,

Witnesseth:

That the said Grantor, for and in consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, and other good and valuable considerations, the receipt of which are hereby acknowledged, has remised, released and forever quitclaimed, and by these presents does hereby remise, release and forever quitclaim unto the said Grantee, its successors and assigns, subject to the reservations and conditions hereinafter set forth, all that certain piece or parcel of land situate, lying and being in the City of Oakland, County of Alameda, State of California, and more particularly described as follows:

Parcel 1: Beginning at a point in the dividing line between the tracts of land designated as "B" and "C" in the partition deed between John C. Hays, John Caperton and others, recorded in Book "A" of Deeds, page 275, et seq., in the office of the County Recorder of said County of Alameda, distant thereon 51.567 feet south  $32^{\circ} 17'$  west from a concrete monument in the center line of the present track of Western Pacific Railway Company; thence south  $78^{\circ} 08'$  west, parallel with said center line, a distance of 965.663 feet to a point; thence north  $11^{\circ} 52'$  west a distance of 22.00 feet to a point; thence south  $78^{\circ} 08'$  west a distance of 212.134 feet to a point; thence south  $7^{\circ} 10'$  west a distance of

63.470 feet to a point; thence south  $78^{\circ} 08'$  west, a distance of 60.00 feet to a point; thence south  $7^{\circ} 10'$  west a distance of 120.00 feet to a point; thence north  $82^{\circ} 50'$  west a distance of 60.00 feet to a point; thence north  $7^{\circ} 10'$  east a distance of 99.301 feet to a point; thence south  $78^{\circ} 08'$  west a distance of 707.903 feet to a point distant 181.396 feet south  $32^{\circ} 17'$  west (measured along the western line of the parcel conveyed to Central Pacific Railroad Company by The Oakland Water Front Company by deed dated May 3, 1878, and recorded February 3, 1879, in Deed Book 175, page 223, Alameda County Records) from a concrete monument set in said western line and distant thereon north  $32^{\circ} 17'$  east 76.870 feet from the center line of the main track of Western Pacific Railroad Company; thence south  $32^{\circ} 17'$  west a distance of 518.801 feet to a point in the eastern production of the agreed low tide line of May 4, 1852, as described in Ordinance 709 N.S. of the City of Oakland; thence south  $57^{\circ} 43'$  east a distance of 150.00 feet to a point; thence south  $22^{\circ} 44' 22''$  west a distance of 550 feet, more or less, to the United States Pierhead line; thence easterly along said Pierhead line 1290 feet, more or less, to a point in the line dividing said tracts "B" and "C"; thence along said dividing line north  $32^{\circ} 17'$  east a distance of 1950 feet, more or less, to the point of beginning.

Parcel 2: Commencing at a concrete monument set on the western boundary line of the parcel of land heretofore conveyed to Central Pacific Rail-

road Company by The Oakland Water Front Company by deed dated May 3, 1878, and recorded February 3, 1879, in Deed Book 175, page 223, Alameda County Records and distant thereon north  $32^{\circ} 17'$  east 76.870 feet from the center line of the main track of Western Pacific Railroad Company; thence south  $32^{\circ} 17'$  west along the said western boundary line a distance of 700.197 feet to a point on the eastern production of the agreed low tide line of May 4th, 1852, as said low tide line is described in Ordinance 709 N.S. of the City of Oakland; thence south  $57^{\circ} 43'$  east a distance of 50.00 feet to the true point of beginning of the area to be described; and running thence south  $57^{\circ} 43'$  east a distance of 100.00 feet to a point; thence south  $22^{\circ} 44' 22''$  west a distance of 635.677 feet to a point on the low tide line as described in the agreement between City of Oakland, Southern Pacific Company and Central Pacific Railroad Company, recorded in Book 2852 of Official Records, page 362, Alameda County Records; thence north  $10^{\circ} 07'$  east along said low tide line a distance of 544.387 feet to a point; thence north  $32^{\circ} 17'$  east a distance of 122.725 feet to the true point of beginning.

Parcel 3: Beginning at the intersection of the dividing line between the tracts of land designated "B" and "C" in the partition deed between John C. Hays, John Caperton and others, recorded in Book "A" of Deeds, page 275, et seq., in the office of the County Recorder of said County of Alameda, with the agreed low tide line of 1852 as described in the agreement between City of Oakland, Southern

Pacific Company and Central Pacific Railroad Company, recorded in Book 2852 of Official Records, page 362, Alameda County Records; thence north  $85^{\circ} 01' 07''$  west along said agreed low tide line 743.489 feet; thence north  $78^{\circ} 48' 15''$  west along said agreed low tide line, 550.824 feet; thence north  $22^{\circ} 44' 22''$  east 83 feet, more or less, to the United States Pierhead Line; thence easterly along said Pierhead Line 1290 feet, more or less, to said dividing line between said tracts of land designated "B" and "C"; and thence along the last named line south  $32^{\circ} 17'$  west 83 feet, more or less, to the point of beginning.

Together with the right and use in common with others of C. & O. Track No. 40 as said right and use is specified in that certain lease agreement by and between the Moore Drydock Company and the Western Pacific Railroad Company identified as Moore Drydock Company Lease No. 26, dated January 1, 1944; and

Together with the following licenses:

License "Q" as executed August 10, 1942, by and between the Western Pacific Railroad Company as Licensor and Moore Drydock Company as Licensee.

License "R," as executed Aug. 1, 1942, by and between the Central Pacific Railroad Company as Licensor and the Moore Drydock Company as Licensee.

License "Z," as executed May 1, 1944, by and between the Western Pacific Railroad Company as Licensor and the Moore Drydock Company as Licensee.



Subject to prior authorization for the use of certain drainage and sewerage structures connecting to drainage and sewerage lines on the heretofore described realty, which drain age and sewerage structures are operated and maintained by the Navy Dapartment, the City of Oakland, the Central Pacific Railroad Company and the Western Pacific Railroad Company.

And further subject to any and all easements, rights-of-way or other encumbrances of record affecting the heretofore described realty.

Excepting, however, from the conveyance and reserving to the United States of America, in accordance with Executive Order 9908, approved on December 5, 1947 (12 F. R. 8223), all uranium, thorium and all other materials determined pursuant to section 5(b)(1) of the Atomic Energy Act of 1946 (60 Stat. 761), to be peculiarly essential to the production of fissionable material contained, in whatever concentration, in deposits in the lands covered by this instrument, are hereby reserved for the use of the United States, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same, making just compensation for any damage or injury occasioned thereby. However, such land may be used, and any rights otherwise acquired by this disposition may be exercised, as if no reservation of such materials had been made; except that, when such use results in the extraction of any such material from the land in quantities which may not be trans-

ferred or delivered without a license under the Atomic Energy Act of 1946, as it now exists or may hereafter be amended, such material shall be the property of the United States Atomic Energy Commission, and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission requires the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other person as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction, and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of deposit in nature. If the Commission does not require delivery of such material to it, the reservation hereby made shall be of no further force or effect.

Together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, in law as well as in equity, of the said Grantor, of, in or to the foregoing described premises, and every part and parcel thereof, with the appurtenances.



And subject to the following covenants and conditions by the grantee herein to be performed:

1. The above-described realty hereinafter referred to as the "plant" is considered a war reserve plant and, as such, will be of vital interest to the United States of America in time of emergency.

2. A dormant estate for a period of twenty (20) years is reserved by the United States of America, which dormant estate may be activated for one or more periods not exceeding five (5) years' duration each. At the completion of the twentieth year, the grantee will have clear and complete title.

3. The grantee, or the Secretary (as hereinafter defined), may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at any time during the twenty-year period when the Secretary determines such action consistent with the national defense interests of the United States.

4. The dormant estate may be activated by the Secretary at any time prior to the expiration of the twenty-year period, by written instructions to the grantee, whenever in the opinion of the Secretary, considerations of national defense so required. In the event the dormant estate is so activated, the United States of America shall have the right to full possession and use of the plant.

5. When, in the opinion of the Secretary, it becomes necessary for the United States of America

to utilize the productive capacity of the plant for purposes of national defense, the United States of America will undertake to negotiate a satisfactory contract with the grantee provided such grantee is, in the opinion of the Secretary, qualified to perform the work designed. In the event a mutually satisfactory contract cannot be negotiated with the grantee within a period of fifteen days, the United States of America may proceed to activate the dormant estate.

6. The Grantee, upon receipt of written notice that the dormant estate has been activated, will immediately proceed to remove improvements, fixtures, alterations, machinery and other equipment, in accordance with the directions and instructions in such notice. Such action will be completed in the shortest possible time but in no case in excess of 120 days from the date written notice is received. Thereafter, the Grantee will immediately vacate and peaceably surrender possession of the plant to the United States of America and will permit the United States of America to have the use of such easements and rights-of-way over and upon the property of the Grantee as may be necessary or convenient for the operation of the plant.

7. In the event the dormant estate is activated, the United States of America will pay to the Grantee:

(a) Reasonable costs and expenses in connection with restoring the plant to its condition at the time of sale or in performing other work,

to the extent required by directions and instructions received from the appropriate Secretary.

(b) Reasonable costs of reinstalling the Grantee's machinery, equipment and improvements when possession of the plant by the United States of America is relinquished to the Grantee.

(c) Fair compensation for loss incurred on work in process in the plant which cannot be completed due to the activation of the dormant estate.

The United States of America will not compensate the Grantee for losses and damages other than herein provided.

8. During the period or periods that the dormant estate is activated, the United States of America will pay the Grantee compensation at a rate to be fixed by the Secretary, which rate shall not be in excess of the prevailing normal rental for similar industrial properties.

9. During the twenty-year period, the Grantee will not, without the written consent of the Secretary, make alterations of the structure of the buildings and will not move or alter any non-severable building, installation or land improvements, which alterations will impair or diminish the capacity, existing at the time of sale, of the facility to produce the items for which it was designed unless restoration can be made within a period of 120 days or less, or unless other facilities determined by the Sec-

retary to have equivalent productive capacity are made available and are made subject to all provisions of this National Security Clause, including the extension thereto of a dormant estate in the United States of America therein, by modification of this contract in writing.

10. The Grantee will maintain all lands, structures and appurtenances now in or appurtenant to the plant and belonging to the United States of America at the time of sale through the period specified below in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time, but in no case in excess of 120 days; provided, however, that Grantee shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified; and provided further that nothing contained in this agreement shall be construed to prevent the Grantee, for improving operating efficiency or increasing productive capacity, from moving any of the machine tools or readily severable facilities conveyed hereunder from place to place within the plant.

Facility	Period Maintenance
(a) Lands, permanent structures and appurtenances (main structural frame of metal, concrete or masonry .....	20 years
(b) Timber structures and their appurtenances .....	15 years
(c) Machinery, machine tools and equipment .....	10 years

11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

12. When, in the opinion of the Secretary, the Grantee fails to comply with the obligations imposed upon it hereunder, the United States of America shall have the right to take full possession of the plant and to take such action as may be necessary to remedy the Grantee's default. All costs incidental to taking possession of the plant under these circumstances and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee. Upon completion of such work, possession of the plant will be returned to the Grantee unless the dormant estate is activated in the interim.

13. In the event the plant is destroyed or otherwise substantially damaged prior to the expiration of the twenty year period, the Secretary will review the necessity for retaining the dormant estate. In the event it is determined by the Secretary that the dormant estate no longer need be retained in the interest of national defense, a quitclaim deed will be given to the Grantee.

14. As used in this agreement the term "Secretary" shall be deemed to refer either to the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, and to their respective duly appointed representatives, depending upon which of said Departments had jurisdiction and



control over the plant prior to its declaration as surplus, or to such of said three Secretaries as may have been designated by the Munitions Board. The term "Grantee" shall be deemed to refer to the Grantee hereunder, its successors, assigns and any subsequent transferee or transferees of the plant. The term "plant" refers to the property sold, conveyed and transferred hereunder and to any part or portion thereof.

15. The Grantee shall cause this agreement to be duly and properly recorded so as to put third persons upon notice of the United States of America's interest in the plant hereunder and shall furnish evidence of such recordation to War Assets Administration.

Said land was duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and WAA Regulation No. 1 as amended.

To have and to hold, all and singular, the said premises with the improvements thereon, unto the said Grantee, and its successors and assigns forever.

And the said Grantee has certified, and by acceptance of this quitclaim deed, agrees for itself, its successors and assigns, as follows:

1. That the said Grantee is acquiring the above-described property for its own use and not for the purpose of reselling the same.

2. That in no way will the Grantee resell the above property within two (2) years from the date



of this instrument without first obtaining the written authorization of the War Assets Administration, or its successor in function.

In witness whereof, Grantor has caused these presents to be executed the day and year first hereinabove written.

UNITED STATES OF  
AMERICA,

Acting by and Through War  
Assets Administration.

By /s/ ROBERT B. BRADFORD,  
Regional Director, Region 10,  
San Francisco, California.

State of California,  
City and County of San Francisco—ss.

On this 21st day of June, 1949, before me, Maude C. Phelps, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Robert B. Bradford, known to me to be the Regional Director, War Assets Administration, Region 10, San Francisco, California, and known to me to be the person who executed the within instrument on behalf of said War Assets Administration, which executed said instrument on behalf of the United States of America, and acknowledged to me that he subscribed to the said instrument the name of the United States of America and the name of the War Assets Administration on behalf of the United States of America, and further

that the United States of America executed said instrument.

Witness my hand and Official Seal.

[Seal]     /s/ MAUDE C. PHELPS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

### Exhibit No. 2

Moore Drydock  
Oakland, Calif.  
M-Calif-174

### Chattel Mortgage

This Mortgage, made and entered into this first day of June, 1949, by Oakland Dock and Warehouse Company, a corporation organized and existing under the laws of the State of California, and having its principal place of business in the Financial Center Building, Oakland, California, Mortgagor, to War Assets Administration, acting for and on behalf of the United States of America, having its office at 1000 Geary Street, San Francisco, California, Mortgagee;

### Witnesseth:

The said Mortgagor does hereby mortgage to said Mortgagee all of the Mortgagor's chattels which are more particularly described as:

All that certain personal property located on that portion of the Moore Drydock Company West Yard, Oakland, California, comprising 52.69 acres, more or less, as owned by the United States of America and conveyed to

Mortgagor by quitclaim deed of even date, the same being more specifically described in WAA-4 Folders Numbered 1, 2, 2a, 3, 3a, 4, 5, 6, 7, 8, 9, 10, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 12, 13, 14, 15, 16, 17, 18, 19, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9, 21, 22-1, 22-2, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8, 22-9, 23, 24, 25, 26, 27 and 28;

Together With any and all replacements of the above-described chattels or any part thereof, which said replacements shall forthwith and without further act be and become subject to the lien of this Mortgage.

All as Security for the payment to and full compliance with the terms and provisions of that certain Promissory Note dated June 1, 1949, executed by the undersigned, Oakland Dock and Warehouse Company, payable to the order of Mortgagee at the office of the War Assets Administration, or its successor in function, in the City of San Francisco, State of California, in lawful money of the United States of America in the principal sum of Nine Hundred Sixty-One Thousand Two Hundred Dollars (\$961,200) with interest on the unpaid balance thereof at the rate of four per cent (4%) per annum from June 1, 1949, payable as to interest and principal as follows: Interest computed from June 1, 1949, payable June 1, 1950, and on each due date of principal thereafter; principal payable in annual installments of Forty-Eight Thousand Sixty Dollars (\$48,060) commencing June 1, 1950, and on June 1

of each and every year thereafter until said balance of Nine Hundred Sixty-One Thousand Two Hundred Dollars (\$961,200), together with accrued interest thereon, shall have been paid in full.

1. Mortgagor Agrees to notify Mortgagee of the acquisition of and/or replacements to the above-described chattels promptly after each acquisition or replacement thereof, stating the nature, quantity or amount of such chattels so acquired, the interest of the Mortgagor therein and the cost thereof to the Mortgagor, and Mortgagor agrees to execute and deliver on demand any and all other instruments which Mortgagee may require to protect its interests or secure said Note, and failure, neglect or refusal to do so may be treated by Mortgagee as a default herein and in said Promissory Note.

2. Mortgagor shall not have the right, power or authority to, and will not, without the written consent of Mortgagee, remove from its present location as herein above set forth, or sell or encumber any of the mortgaged chattels, or substitute or replace any of the mortgaged chattels.

3. The Mortgagee Agrees to release all the chattels from the lien of this chattel mortgage upon the payment by Mortgagor to Mortgagee the sum of Three Hundred Sixty-Six Thousand Six Hundred Sixty Dollars (\$366,660), which sum has been established as the fair value of said chattels. The Mortgagee will also release a part or any portion of said chattels upon the payment by the Mortgagor to

Mortgagee of the fair value (fair value to be established by Mortgagee) of the property to be released. All payments so made shall be applied against the unpaid balance of the total indebtedness of Nine Hundred Sixty-One Thousand Two Hundred Dollars (\$961,200) in the inverse order of maturity, as specified in the terms of the promissory note of even date.

4. Mortgagor Agrees not to create or permit to accrue, upon or in respect to Mortgagor's chattels, or any part thereof, any lien, encumbrance, tax, assessment or charge which, if unpaid, would be or become prior or equal to the lien of this mortgage, or would have priority or equality in distribution on any sale of the mortgaged chattel. Mortgagor agrees to carry and pay for adequate insurance against fire and such other risks as Mortgagee may require and in such companies, forms and amounts as may be approved by Mortgagee, with loss payable to the parties concerned, including Mortgagee, as their interests may appear. Mortgagee may at any time, and from time to time, pay or cause to be paid any such lien, encumbrance or other charge or expense, and may take all action necessary or proper to effect a discharge, satisfaction or subordination thereof. All sums and any and all incidental costs and expenses paid or incurred by Mortgagee in connection therewith, or for the preservation or maintenance of the chattels covered by this mortgage, with interest thereon, shall be added to the principal amount then due on the note and shall be secured by this mortgage.



5. Mortgagor will, while any of the indebtedness secured hereby remains unpaid, pay, at least ten (10) days before delinquency, all taxes (both general and special), assessments and governmental charges lawfully levied or assessed against the said chattels or any part thereof; promptly will furnish the Mortgagee or holder of the indebtedness secured hereby the official receipts showing such payments except when payments are made by Mortgagee as herein before provided; and will allow no payment of any taxes, assessments or governmental charges by a third party with subrogation attaching, nor permit the said chattels, or any part thereof, to be sold or forfeited for any tax, assessment or governmental charge whatsoever. Any irregularities or defects in the levy or assessments of taxes, assessments and governmental charges paid by the Mortgagee are hereby expressly waived and a receipt by the proper officer shall be conclusive evidence both as to the amount and validity of such payments.

6. Mortgagor Agrees to maintain the said chattels as herein above described and every part thereof in thorough repair, working order and condition, and free from waste or nuisance of any kind; will make from time to time all repairs, renewals, replacements, improvements, betterments and additions which may be needful or proper to preserve and maintain the said chattels; will operate the said chattels in an efficient and first-class manner; will use diligence to keep the said chattels in state of good order and repair; will comply with and abide by all laws, ordinances and regulations affecting the



said chattels or the maintenance, repair, alteration, improvement or use thereof; will not alter, destroy or remove any of the chattels or permit the same to be altered, destroyed or removed, without first obtaining the permission, in writing, of the Mortgagee; and will permit the Mortgagee, its agents or representatives to inspect the said chattels at any reasonable time or times; and will do any other act or acts, all in a timely and proper manner, which from the character or use of the said chattels may be reasonably necessary to preserve the same.

7. It Is Also Agreed that if the Mortgagor shall fail to make any payments or default in any of the terms, conditions, covenants or agreements in said Promissory Note or this Chattel Mortgage provided or referred to, or made incidental to or in connection with the loan secured hereby, or if there be a breach or failure in any of the covenants or warrants herein contained, then the Mortgagee may take possession of said chattels, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, it being hereby understood that the Mortgagee or the holder of the aforesaid Note may purchase at such sale, and from the proceeds pay the whole amount payable hereunder and under said Note and all costs of sale, including costs of title search, and reasonable counsel fees in connection therewith, paying the overplus to the said Mortgagor, all of said costs, including said counsel fees, being hereby secured, and in the event of any foreclosure or other action in Court,

the appointment of a Receiver, without notice, is hereby consented to.

8. It Is Further Agreed that said Promissory Note is also secured by a certain Deed of Trust to the United States of America, acting by and through War Assets Administration, of even date herewith and it is hereby agreed that in case of default under said Note, the holder thereof may, at its sole option, and without limiting or affecting any rights or remedies conferred upon it by this Mortgage or said Deed of Trust, foreclose this Mortgage and/or exercise any of the rights and remedies conferred upon it under said Deed of Trust, either concurrently, or in such order as it may determine, and may sell, or cause to be sold, in such order as it may determine, as a whole, or in such parcels as it may determine, the chattels described in this Mortgage and/or in said Deed of Trust.

9. Said Mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned chattels and that there are no liens or encumbrances or adverse claims of any kind whatever on the same or any part thereof.

In Witness Whereof, the said Mortgagor has duly [illegible] these presents the day and year first above written.

OAKLAND DOCK AND  
WAREHOUSE COMPANY,

By JULES J. AGOSTINI, JR.,  
President.

Attest.

[Seal]

A. HANFORD MORGAN,  
Secretary.

State of California,  
County of Alameda—ss.

On this 29th day of June, 1949, before me, Elizabeth M. Lifschiz, a Notary Public in and for the County of Alameda, State of California, duly commissioned and sworn, personally appeared Jules J. Agostini, Jr., known to me to be the President, and A. Hanford Morgan, known to me to be the Secretary, of Oakland Dock and Warehouse Company, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and Official Seal.

[Seal]

ELIZABETH M. LIFSCHIZ,  
Notary Public in and for the County of Alameda,  
State of California.

My commission expires June 17, 1950.

Exhibit No. 3

Moore Dry Dock Co.  
(M-Cal-174)

Modification of Covenants and Conditions of  
Quitclaim Deed

This Indenture, Made this 28th day of February,  
1950, by and between the United States of America,

acting by and through the General Services Administrator, under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, approved June 30, 1949, and the Surplus Property Act of 1944 (58 Stat. 765) as amended thereby, and regulations and orders promulgated thereunder, hereinafter referred to as Grantor, and Oakland Dock and Warehouse Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, hereinafter referred to as Grantee;

Witnesseth: That the said Grantor does hereby consent to the striking from the Quitclaim Deed heretofore made by Grantor to Grantee, dated the 1st day of June, 1949, and recorded in Book 5831 at page 575, in the County Recorder's Office of the County of Alameda, State of California, on the 29th day of June, 1949, all that part of said Quitclaim Deed beginning with the words,

“And Subject to the following covenants and conditions by the Grantee herein to be performed:”

including paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, which last named paragraph ends with the phrase,

“and shall furnish evidence of such recordation to War Assets Administration.”

and the insertion in lieu thereof, of the following:

And Subject to the following conditions and covenants by the Grantor and the Grantee herein to be performed:

1. The granted premises hereinafter referred to as "plant" constitute a part of the National Industrial Reserve under Public Law 883, 80th Congress, approved July 2, 1948, and have been designated for disposal subject to the provisions of the National Security Clause. This, and the following provisions constitute the National Security Clause of this quit-claim deed.

2. A dormant state for a period of twenty (20) years is reserved by the United States of America, which dormant estate may be activated for one or more periods not exceeding five (5) years' duration each. At the completion of the twentieth year, the Grantee will have clear and complete title.

3. The Grantee, or the Secretary (as hereinafter defined) may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at any time during the twenty-year period when the Secretary determines such action consistent with the national defense interests of the United States.

4. The dormant estate may be activated by the Secretary at any time prior to the expiration of the twenty-year period by written instructions to the Grantee whenever, in the opinion of the Secretary, considerations of national defense so require. In the event the dormant estate is so activated, the United States shall have the right to full possession and use of the plant.

5. When, in the opinion of the Secretary, it be-



comes necessary for the United States of America to utilize, in accord with the provisions of Public Law 883, 80th Congress, the productive capacity of the plant for the purpose of national defense, the United States of America will undertake to negotiate a satisfactory contract with the Grantee, provided such Grantee is, in the opinion of the Secretary, qualified to perform the work desired. In the event a mutually satisfactory contract cannot be negotiated with the Grantee within a period of fifteen days, the United States of America may proceed to activate the dormant estate.

6. The Grantee, upon receipt of written notice that the dormant estate has been activated, will immediately proceed, subject to the availability of labor and material, to remove improvements, fixtures, alterations, machinery and other equipment, in accordance with the directions and instructions in such notice. Such action will be completed in the shortest possible time but in no case in excess of 120 days from the date written notice is received. Thereafter, the Grantee will immediately vacate and peaceably surrender possession of the plant to the United States of America and will permit the United States of America to have the use of such easements and rights-of-way over and upon the property of the Grantee as may be necessary or convenient for the operation of the plant.

7. In the event the dormant estate is activated, the United States of America will pay to the Grantee:

(a) Upon completion of the work involved,



fair and reasonable costs incurred by Grantee in complying with paragraph 6 hereof.

(b) When possession of the plant is relinquished to Grantee by the United States of America, reasonable costs of reinstalling Grantee's machinery and equipment and reasonable costs of restoring the plant and all structures and buildings on the plant to the condition they were in at the time the United States went into possession, reasonable depreciation excepted.

(c) Fair compensation for loss incurred on work in process in the plant which cannot be completed due to the activation of the dormant estate.

The United States of America will not compensate the Grantee for losses and damages other than herein provided.

8. During any period in which the dormant estate has been activated, the Government will pay Grantee fair and reasonable compensation for the use of the premises and appurtenances, and the machinery and equipment taken over by the Government, at a monthly rate which shall not be in excess of the prevailing normal rental for similar industrial properties in the locality.

9. During the twenty-year period, the Grantee will not make any alterations, improvements, additions or extensions to the buildings and structures or erect any new building or structure on the premises which would diminish the capacity or impair the utility of the plant for the purpose for which it was

designed, unless the plant can be restored to efficient operation for its designed purpose within not to exceed 120 days. Except as otherwise herein provided, the Grantee, during the twenty-year period, may (i) alter, improve, add to or extend any or all of the buildings and structures now on the property, (ii) erect additional buildings and structures on all or any part of the premises not now occupied by the permanent buildings (main structural frame of metal, concrete or masonry) and the piers and (iii) replace any of the piers and nonpermanent buildings and structures with piers and buildings or structures having equivalent capacity. All such work shall be done in compliance with the Building Code and Fire Ordinances of the City of Oakland, California.

10. The Grantee will maintain all lands, structures and appurtenances now on the plant and all buildings and structures placed thereon by Grantee, reasonable wear and tear and aging excepted, through the twenty-year period in such condition that the plant can be put into efficient operation for its intended defense use in the shortest possible time but in no event, in excess of 120 days.

11. The Secretary shall have the right to conduct an inspection or survey of the plant at any time, subject to prior written notice thereof to the Grantee.

12. If, as a result of inspection of the plant, the Government adjudges the Grantee in default, it shall furnish to the latter a written statement setting forth in detail the grounds on which the allegations are

based, following which the Grantee shall have thirty days to submit evidence to the contrary. If, in the light of the evidence so presented, the Government still holds that the Grantee is in default, it shall then advise the latter of the specific defaults to be corrected and the periods of time in which each correction must be completed, such periods to be as reasonable as possible. If the Grantee fails to correct its defaults in the times stated, the Government shall then have the right to take possession only of that part of the premises on which the breach has occurred and to remedy the Grantee's default. The Government, or any contractor employed by the Government for the purpose, shall have such right of access over Grantee's premises to that part thereof as may be necessary to permit repairs and replacements to be made to correct the default of Grantee. All costs incidental to taking possession of such part of the plant as may be necessary under these circumstances, and of the work performed or action taken under the direction of the United States of America, shall be borne by the Grantee. Upon completion of such work, possession of the part, or parts, of the plant taken over by the Government will be returned to the Grantee unless the dormant estate is activated in the interim.

13. In the event the plant is destroyed or otherwise substantially damaged prior to the expiration of the twenty-year period, the Secretary will review the necessity for retaining the dormant estate. In the event it is determined by the Secretary that the dormant estate no longer need be retained in the

interest of national defense, a quitclaim deed will be given to the Grantee.

14. As used in this agreement, the term "Secretary" shall be deemed to refer to the Secretary of Defense, as used in Public Law 883, 80th Congress, and to his duly appointed representatives. The term "Grantee" shall be deemed to refer to the Grantee hereunder, its successors, assigns, and any subsequent transferee or transferees of the plant. The term "plant" refers to the property sold, conveyed and transferred hereunder and to any part or portion thereof.

15. The Grantee shall cause this agreement to be duly and properly recorded so as to put third persons upon notice of the United States of America's interest in the plant hereunder and shall furnish evidence of such recordation to General Services Administration, successor in function to War Assets Administration.

In Witness Whereof, the parties hereto have caused this Modification of Covenants and Conditions of Quitclaim Deed to be executed as of the day and year first hereinabove written.

UNITED STATES OF  
AMERICA,

Acting by and Through Gen-  
eral Services Administrator.

By /s/ ROBERT B. BRADFORD,  
Regional Director Liquidation Service, General  
Services Administration, San Francisco, Cali-  
fornia.

OAKLAND DOCK AND  
WAREHOUSE COMPANY,

By /s/ JULES J. AGOSTINI, JR.,  
President.

Attest:

/s/ A. HANFORD MORGAN,  
Secretary.

State of California,  
City and County of San Francisco—ss.

On this 28th day of February, 19 , before me, Steve G. Chapralis, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Robert B. Bradford, known to me to be the Regional Director, War Assets, General Services Administration, San Francisco, California, and known to me to be the person who executed the within instrument on behalf of the General Services Administrator, who executed the said instrument on behalf of the United States of America, and acknowledged to me that he subscribed to the said instrument the name of the United States of America and the name of the General Services Administrator on behalf of the United States of America, and further, that the United States of America executed said instrument.

Witness my hand and official seal.

[Seal] /s/ STEVE G. CHAPRALIS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires October 22, 1952.



State of California,  
County of Alameda—ss.

On this 28th day of February, 1950, before me, Charlotte S. Nutting, a Notary Public in and for the County of Alameda, State of California, duly commissioned and sworn, personally appeared Jules J. Agostini, Jr., known to me to be the President, and A. Hanford Morgan, known to me to be the Secretary, of the Oakland Dock and Warehouse Company, the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that said corporation executed the same.

Witness my hand and official seal.

[Seal] CHARLOTTE S. NUTTING,  
Notary Public in and for the County of Alameda,  
State of California.

My commission expires April 8, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 29820

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COMPANY,

Defendant.

ORDER DENYING MOTION TO DISMISS AND  
GRANTING MOTION FOR TEMPORARY  
INJUNCTION

It is the opinion of this Court that the defendant's motion to dismiss should be denied and that plaintiff's motion for a temporary injunction should be granted for the following reasons:

1. Defendant accepted delivery and acquired title to the personal property in issue in this action, subject to all covenants, conditions, restrictions, and reservations set forth in the bill of sale. These included a covenant against the resale, sale, or disposal of the machine tools or other severable productive equipment, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed.

2. These restrictions and covenants are not void as unlawful restraints on alienation but are authorized by the provisions of the National Industrial

Reserve Act of 1948, 62 Stat. 1225. California law governing restraints on alienation does not control such transfer or accompanying restraints.

3. Notwithstanding the covenants and restrictions set forth in said bill of sale and in violation of the terms thereof, defendant has sold and disposed of certain of said machine tools and items of industrial equipment to third persons; and defendant will, unless restrained by order of this Court, sell and dispose of additional items of said machine tools and industrial equipment.

4. Further sale and disposition of said machine tools and items of industrial equipment will materially reduce the capacity of the plant to produce the items for which it was designed. Such further sale and disposition of said machine tools and items of equipment will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948, and would cause irreparable damage to the plaintiff.

5. Plaintiff is therefore entitled to a preliminary injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale, other than the items of personal property listed in Schedule "A" attached to said bill of sale, without the written consent of the Secretary of the Navy. Such injunction, however, is granted without prejudice to defendant's right to enter into any lease agreement with any third party involving the use of said machine tools or items of industrial equipment or the real property on which

said tools and equipment are located, provided such lease shall not permit the removal of said tools and equipment from said premises.

Dated: July 13th, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed July 13, 1950.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF  
APPEALS UNDER RULE 73 (B)

Notice is hereby given that the Oakland Dock and Warehouse Company, a corporation, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the above-entitled Court granting the motion of the plaintiff for a temporary injunction, entered in this action on the 13th day of July, 1950.

Dated: July 17, 1950.

/s/ WM. H. NEBLETT,  
Attorney for Appellant, Oakland Dock and Warehouse Co.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1950.

[Title of District Court and Cause.]

DESIGNATION OF THE PARTS OF THE  
RECORD TO BE PRINTED ON APPEAL

Comes now the Oakland Dock and Warehouse Company, the defendant and appellant in the above-entitled action, and designates the parts of the record it desires to have printed for use on its appeal to the United States Court of Appeals for the Ninth Circuit from the order herein granting a preliminary injunction, which order was entered July 13, 1950.

1. The complaint, with the Exhibits attached, except that it desires to omit from the printed record Schedule "A," which is a part of Exhibit 1 to the complaint. Schedule "A" to Exhibit 1, otherwise described as Exhibit "G" is not involved in this action.

2. The affidavit of John Raully.

3. Points and authorities in support of temporary restraining order and order to show cause.

4. Temporary restraining order.

5. Please insert the date on which each of these pleadings and order were filed.

6. The motion of the defendant to dismiss the complaint, together with the points and authorities attached.

7. The answer of the defendant to the complaint.

8. Counter-affidavit of Jules J. Agostini, Jr., in



reply to affidavit of John Rauly, together with Exhibits 1, 2 and 3 attached thereto (Quitclaim Deed dated June 1, 1949; Chattel Mortgage dated June 1, 1949; and Modifications of Covenants and Conditions of Quitclaim Deed dated February 28, 1950.)

9. Please note filing marks on these pleadings and affidavits filed by the defendant.

10. Order denying motion to dismiss and granting motion for temporary injunction filed July 13, 1950.

11. Notice of appeal filed July 17, 1950.

12. Notation on the record that cost bond for \$250.00 was filed with the notice of appeal.

13. A daily transcript was furnished to the Court and to the defendant at the request of the defendant during the four days of hearing. Defendant desires that the testimony of all witnesses taken at the hearing be printed, together with all documents which were read into evidence. At the direction of the Clerk the defendant will promptly reduce this testimony to narrative form. A certified copy of the daily transcript has been filed with the Clerk.

14. Defendant requests that all Exhibits introduced at the hearing be filed with the higher Court without being printed. They are extremely bulky. The greater part of these Exhibits are not material to the case. However, defendant does request that

all Exhibits which were read into the record be printed.

Dated: July 17, 1950.

/s/ WM. H. NEBLETT,  
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1950.

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[Title of District Court and Cause.]

POINTS APPELLANT WILL MAKE  
ON THE APPEAL

The appellant will present as its points on the Appeal herein the following things to show that the Court erred in granting the temporary injunction:

1. The complaint does not state a cause of action for an injunction, and the motion to dismiss should have been granted.

2. The defendant is enjoined from selling and otherwise disposing of any of the personal property involved without the written consent of the Secretary of the Navy. The Secretary of the Navy has no authority whatever under Public Law 883, 80th Congress. All of the authority conferred by that Act of Congress is vested in the Secretary of Defense. The temporary injunction is void on its face.

3. The restrictions or covenants against re-sale

of the personal property contained in the Bill of Sale are void as an unlawful restraint on alienation. The California law applies. There is no federal law regulating the disposal of property. The law of the state where the property is situated is the sole law applicable thereto.

4. The order of the Court of July 13, 1950, is an attempt to prevent an alleged breach of contract by injunction.

5. The defendant will urge all six of the reasons appearing in its motion to dismiss on this appeal.

6. The modified Quitclaim Deed dated February 28, 1950, removes the alleged Security Clause from the personal property and sets up in paragraphs 11 and 12 thereof a complete plan and the only plan open to the Secretary of Defense for meeting an alleged breach on the part of the grantee and vendee, the appellant herein. This modified Quitclaim Deed also provides a complete plan for taking over the property upon the conditions and covenants therein contained in the event of an emergency. The Appellate Court will take judicial notice of the existing emergency and the date when it came into being:\*

/s/ WM. H. NEBLETT,  
Attorney for Appellant.

\*As additional designation of parts of the record to be printed, defendant requests that the Notice of Appeal, the Designation of the parts of the rec-

ord to be printed, and these Points be included in the printed record.

Receipt of copy acknowledged.

[Endorsed]: Filed.

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[Title of District Court and Cause:]

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND INTERLOCUTORY DECREE  
OF INJUNCTION

Pursuant to an order to show cause heretofore issued on the 8th day of June, 1950, based upon the affidavit of John Rauly, directed to the defendant herein, requiring said defendant to show cause, if any it had, why it should not be enjoined, pending the trial of this matter, from selling, delivering, contracting to sell, offering to sell, or otherwise disposing of any of the personal property acquired by the defendant, under the bill of sale, annexed to the complaint on file herein, without the written consent of the Secretary of Navy; and

Pursuant to a motion to dismiss filed by the defendant herein to said complaint,

Said order to show cause and said motion came on regularly for hearing on the 16th, 20th, 21st and 22nd days of June, 1950, in the above-entitled Court before the Honorable Herbert W. Erskine, United States District Judge, said plaintiff being represented by Frank J. Hennessy, Esquire, United States Attorney, and Robert F. Peckham,

Assistant United States Attorney, and defendant being represented by William H. Neblett, Attorney at Law, and oral and documentary evidence having been introduced, and the matter having been argued and submitted upon said evidence and points and authorities submitted herein, and upon the files and the records herein; and

The Court having considered the same and heard the arguments of counsel, and being fully advised, makes the following:

### Findings of Fact

#### I.

This action arises under and involves the interpretation and effect of the following Acts of Congress of the United States of America:

1. The National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225);

2. National Security Act of 1947 (61 Stat. 495);

3. Surplus Property Act of 1944, as amended, (Act of October 3, 1944, 58 Stat. 765, as amended, 50 App. U.S.C. 611, et seq.).

#### II.

Defendant Oakland Dock and Warehouse Company is a corporation duly organized and existing under the laws of the State of California, with its principal place of business at 1401 Middle Harbor Road, Oakland, California.



## III.

By bill of sale dated June 1, 1949, plaintiff, acting through the War Assets Administration, an agency of the United States, sold, transferred, assigned, and delivered to the defendant certain industrial equipment, machine tools, and tools, more particularly described in said bill of sale as WAA-4 Folders Numbered 1, 2, 2a, 3, 3a, 4, 5, 6, 7, 8, 9, 10, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 12, 13, 14, 15, 16, 17, 18, 19, 20-1, 20-2, 20-3, 20-4, 20-5, 20-6, 20-7, 20-8, 20-9, 21, 22-1, 22-2, 22-3, 22-4, 22-5, 22-6, 22-7, 22-8, 22-9, 23, 24, 25, 26, 27 and 28, upon the covenants, restrictions, conditions, and reservations set forth in said bill of sale, including, among others, the following:

“1. The Government-owned portions of the Moore Drydock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant,’ in which the above-described chattels are located, is considered a war reserve plant and as such will be of vital interest to the nation in time of emergency.

“2. In a quitclaim deed, of even date, and delivered concurrently herewith, whereby the Vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the Vendee herein, the Vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years’ duration each.

“3. The Vendee for a period of ten (10) years

from the date hereof will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction, remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment, provided, however, that the Vendee is authorized to sell or otherwise dispose of those machine tools or other severable production equipment as listed in Exhibit 'G' of the Moore Drydock Company West Yard Invitation for Bids dated March 31, 1949, which is attached hereto as Schedule 'A' and made a part hereof."

Said covenants, restrictions, conditions, and reservations comprise the "National Security Clause," as that term is defined in Section 452(c), U.S.C.A. Title 50.

#### IV.

Prior to the execution of said bill of sale and the delivery of said personal property to the defendant herein, said machine tools and items of equipment had been designated as necessary to the national defense to be disposed of under the National Security Clause within the meaning of the National Security Act of 1947 and of the National Industrial Reserve Act of 1948. Said personal property is a part of the National Industrial Reserve.

## V.

Defendant, notwithstanding the covenants, restrictions, conditions, and reservations set forth in said bill of sale, and in violation of the terms thereof, has sold and disposed of certain of said machine tools and items of industrial equipment to third persons without the written consent of the Secretary of the Navy (the Navy Department being the department which has jurisdiction over said personal property). The machine tools and items of industrial equipment already sold and disposed of by defendant and which will be sold and disposed of, unless restrained by order of this Court, did not and will not consist of those machine tools and items of equipment listed in Schedule A attached to said bill of sale.

## VI.

Unless restrained by order of this Court, defendant will sell, offer for sale, remove, and dispose of additional machine tools and items of industrial equipment, which were conveyed to defendant subject to said covenants, restrictions, conditions, and reservations, without the written consent of the Secretary of the Navy. Further sale and disposition of said machine tools and items of equipment will materially reduce the capacity of the plant to produce the items for which it was designated. Many essential machine tools and items of equipment described herein, which defendant will sell unless restrained by order of Court, cannot be replaced within 120 days. Such further sale and disposition

of said machine tools and items of equipment will frustrate and subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948, and will cause irreparable damage to the plaintiff.

#### VII.

Defendant has not made, does not propose to make, will not and cannot make, replacement of equivalent machine tools and items of industrial equipment in lieu of those of which defendant has sold and disposed of and will sell and dispose of unless restrained by order of this Court.

#### VIII.

The said machine tools and items of equipment are located at the former West Yard of the Moore Drydock Company, Oakland, California, now owned by the defendant subject to the National Security Clause. The said West Yard, together with the said machine tools and items of equipment, was built and operated for the purpose of building and repairing ships required by the United States in time of national emergency. The said machine tools and items of equipment can now be used and can continue to be used for the purpose of shipbuilding and ship repairing, and are essential and necessary if the capacity of the said plant to produce the items for which it was designed is not to be materially reduced.

#### IX.

The "National Security Clause" has not been removed and the said machine tools and items of

equipment are still in the possession of the defendant subject to all the said covenants, restrictions, conditions, and reservations embodied in the said National Security Clause.

### X.

Plaintiff has no plain, speedy, or adequate remedy at law and will suffer great and irreparable injury unless, during the pendency of this action, defendant, its servants, agents, and attorneys are enjoined from selling, removing, delivering or otherwise disposing of any of the personal property acquired by plaintiff under said bill of sale other than the items of personal property listed in Schedule A attached to said bill of sale, without the written consent of the Secretary of the Navy.

### Conclusions of Law

From the foregoing facts, the Court makes the following conclusions of law:

#### I.

The said machine tools and items of equipment are part of the "National Industrial Reserve" and are in the possession of the defendant subject to the "National Security Clause" within the meaning of the National Industrial Act of 1948.

#### II.

Further sale and disposition of said machine tools and items of equipment will frustrate and subvert the public policy of the United States as embodied



in the National Industrial Reserve Act of 1948, and will cause irreparable damage to the plaintiff.

### III.

Plaintiff is therefore entitled to a preliminary injunction enjoining defendant, its officers, agents and servants from selling or otherwise disposing of any of the personal property acquired by defendant under said bill of sale, other than the items of personal property listed in Schedule A attached to said bill of sale, without the written consent of the Secretary of the Navy.

### Decree

Now, Therefore, It Is Hereby Ordered, that the defendant's motion to dismiss is denied.

It Is Further Ordered that the defendant, its agents, servants, employees and attorneys, collectively and individually, and all persons having knowledge of this order, and each of them, are enjoined, restrained, and ordered, during the pendency of this action, from selling, removing, delivering, offering to sell, or otherwise disposing of any of the said machine tools and items of equipment acquired by the defendant under said bill of sale, other than the items of personal property listed in Exhibit G of Schedule A attached to said bill of sale, without the written consent of the Secretary of the Navy. Such injunction, however, is granted without prejudice to defendant's right to enter into any lease agreement with any third party involving the use of said machine tools or items of industrial equip-

ment or the real property on which said tools and equipment are located, provided such lease shall not permit the removal of said tools and equipment from said premises.

Dated: July 31st, 1950.

/s/ HERBERT W. ERSKINE,  
Judge of United States  
District Court.

Lodged July 7, 1950.

[Endorsed]: Filed July 31, 1950.

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[Title of District Court and Cause.]

COUNTER DESIGNATION OF  
THE RECORD ON APPEAL

Comes now the plaintiff and appellee herein and, pursuant to Rule 75 of the Federal Rules of Civil Procedure, designates the record on appeal to the United States Court of Appeals for the Ninth Circuit as follows, to wit:

1. All pleadings, orders, transcripts of testimony, exhibits, and all other designations heretofore made by the appellant herein.
2. In addition thereto, the Findings of Fact, Conclusions of Law, and Interlocutory Decree of Injunction entered on July 31, 1950.
3. It is requested that all exhibits be transmitted

to the said Court of Appeals, together with the Clerk's transcript.

Dated: August 7, 1950.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ ROBERT F. PECKHAM,  
Assistant United States Attorney, Attorneys for  
Plaintiff.

[Endorsed]: Filed August 8, 1950.

In the District Court of the United States, North-  
ern District of California, Southern Division

No. 29820

In the Matter of

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OAKLAND DOCK AND WAREHOUSE COM-  
PANY,

Defendant.

ORDER TO SHOW CAUSE

San Francisco, California

Friday, June 16, 1950

Before: Honorable Herbert W. Erskine,  
Judge.

Appearances:

FRANK J. HENNESSY,

U. S. Attorney by

ROBERT F. PECKHAM, ESQUIRE,

Assistant U. S. Attorney.

WILLIAM H. NEBLETT, ESQUIRE,

On behalf of the Defendant.

The Clerk: United States versus Oakland Dock  
and Warehouse Company, Order to Show Cause.

Mr. Peckham: Ready for the Plaintiff, your  
Honor:

Mr. Neblett: Ready for the defendant, your Honor.

Mr. Peckham: Your Honor, in this action, if your Honor will recall, the Temporary Restraining Order was issued on June 6, returnable today. Subsequent to that time, Colonel William Neblett, counsel for the Warehouse Company, has filed a motion to dismiss and an answer, together with a counter-affidavit by the president of the corporation, which is on file in this case.

The statute this action, your Honor, arises out of, the action in which the government contends that the defendant company had violated the restrictions and reservations that have been placed in the deed of trust and the quit claim deed and the bill of sale by which they received certain surplus property, namely, the machinery and equipment at the West Yard of the former Moore Drydock Company, located in Oakland, California.

Now, the basis for the inclusion of the conditions and restrictions, which are called the National Securities Clause, is the National Industrial Reserve Act of 1948. In that Act, which is located——

The Court: What is that Act? [3\*]

Mr. Peckham: Title 50, Section 451 through 462. The National Industrial Reserve Act, the Congressional policy is declared to be that where surplus property is being, is designated by the Secretary of Defense as belonging, as being part of the Industrial Reserve that may be sold. However, as in the discretion of the Secretary, there may be placed

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\* Page numbering appearing at top of page of original Transcript of Record.



certain reservations upon said property and those reservations are termed the National Securities Clause.

In this case the reservations are contained in the quit claim deed, which was signed on June 1, 1949, and that quit claim deed included real property. There was also, as of the same date, a bill of sale given for the machinery and material and equipment, and that also included a National Securities Clause provision.

Now, it is with the latter provisions that we are concerned with here. Those provisions contained in the bill of sale, and I would like to outline them as I go along, your Honor.

The Court: Only one appearing for the United States?

Mr. Peckham: Yes.

The Clerk: Who is appearing for the defendants?

Mr. Peckham: Colonel William Neblett is representing the Oakland Dock and Warehouse Company; there is no other appearance. Counsel just sitting in, interested counsel, but there is no other appearance.

During World War II the United States Maritime Commission [4] acquired and constructed and installed the yards over there, as perhaps your Honor is acquainted, at the head of the San Antonio Estuary. The cost, the acquisition cost of the yard and machinery and equipment was over \$10,000,000.00, \$1,246,396.00 representing the actual cost of the plant. At the end of the war these facilities

were declared surplus by the Maritime Commission and turned over to a Surplus Property Administration, later the War Assets Administration, for disposal.

Now, the Munitions Board of the Department of Defence determined that the facilities were to be part of the Industrial Reserve and notified the War Assets Administration these facilities were not to be disposed of without being subject to the National Securities Clause.

I might say, your Honor, that the Munitions Board was delegated all the authority given by this Act by the Secretary of Defence Forrestal on July 3, 1949. Now, the——

The Court: What is that National Securities Clause?

Mr. Peckham: Well, let me illustrate by telling your Honor about the provisions that are found in the bill of sale pertinent to this property. The bill of sale provided in this case that for a period of ten years the defendant Oakland Dock and Warehouse Company would not without the written consent of the Secretary of the Navy, remove, sell or dispose of any of the machines, tools, or other production equipment, the loss of which [5] would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machines, tools or separable production.

The bill of sale provides further that the Oakland Company will for ten years protect and maintain the machinery and machine tools so that same may

be put into operation within 120 days after notification by the Secretary in the event of a national emergency. In other words, the purpose of the clause was to keep the plant in one piece as near as possible and to prevent it being sold off piecemeal, so that in the event of a national emergency the plant would be in such shape it could resume production in a period of approximately 120 days from the date it was determined it was necessary for the dormant estate to be activated by the government.

The bill of sale conveys the rights, title and interest of the government in this surplus property to the vendee, but it contains this reservation of what is called the dormant estate. This dormant can then be activated as it appears in the provisions.

Now, the War Assets Administration, on April 1, 1949, accepted the offer of the defendant Oakland Company to purchase this former West Yard of Moore Dry Dock for \$1,215,000.00, not only for the real property, but also for the machinery and equipment, subject to the provisions of the National Security Clause. There had been prior bids on behalf, made by Oakland [6] Company and considerable negotiations regarding the instructions contained in that clause, the National Securities Clause.

The transfer of those facilities was the subject of these two instruments I have spoken of, namely, the quit claim deed, which I believe is annexed to counsel's affidavit, is that correct? The quit claim deed dated June 1, 1949? The quit claim deed and the amendment and the notification.

The Court: There is also here a bill of sale.

Mr. Peckham: The bill of sale I knew was annexed to our affidavit or complaint, your Honor.

These three documents I am sure they will come into the argument, discussion here. The first quit claim deed of June 1, which related to the real property but also had reference to the machinery and equipment. At the same time there was also executed and delivered a bill of sale with the National Securities provisions. There are certain differences in the number of years between the real property and the machinery, but I don't think it concerns us here.

Subsequently, I believe on February 9 of this year, there was a modification of the provisions in the quit claim deed. The modifications pertain to giving the purchaser, the defendant in this case, more leeway in handling the rearranging of the yard and building to the facilities there, but that modification pertains to the real property and to the structures thereon and not to the machinery and equipment; that the provisions that [7] are in the bill of sale contends to pertain to the machinery and equipment and though there is no mention in this modified quit claim deed of the machinery and equipment, and there is no reference or cancellation or revocation of the reservation contained in the bill of sale provided for in this modified quit claim deed.

So that it is our provision that the reservations, the so-called National Securities Clause provisions found in the bill of sale were not at all affected by the modified quit claim deed.



Now, the Oakland Company has for a period of considerably thirty days prior to the issuance of the temporary restraining order, so that the delivered machine tools, machinery and equipment which were subject to this National Securities Clause, and we were prepared to show your Honor in support of our application for a preliminary injunction that these sales have taken place, there has been widespread advertising in newspapers, and circulation of an attractive brochure offering this machinery and equipment for sale, and such sales and deliveries have taken place and continue to take place until the issuance of the temporary restraining order.

Now, I have been conferring with counsel for the defendant, and while this is very much disputed matter, there is apparent dispute as to the fact that these sales have taken place and that these deliveries have been made, and the sales and [8] deliveries have been made of property covered by the provisions of the—the reservations that are found in the bill of sale.

Going back, your Honor, to the determination of the West Yard Moore Dry Dock Company being designated as part of the Industrial Reserve, such designation is found, was originally found as included, as pointed out in the affidavit, as annexed to the complaint, in the letter from a Major General Timberlake of the Munitions Board to the War Surplus Administration, which states that this yard is one of approximately, I believe, 114 defence plants and similar establishments that could only be dis-



posed of as surplus property if the National Securities Clause was included.

Subsequently, in the reports of the Munitions Board to the Congress on the National Industrial Reserve of April 1, 1949, and the supplemental and second annual report of April 1, 1950, to Congress, the West Yard of the former Moore Dry Dock Company has been included as part of the National Industrial Reserve.

It is the contention of the Government and the reason for its application for a preliminary injunction pending the determination of the matter, that the strength of the National Securities Clause rests, not only in this case, but in other cases, will largely be determined by what action is taken in this case. The Government contends that of course that it is subject to irreparable damage and when the National Securities Clause is violated, that the intent of Congress has been, the [9] integrity of the National Reserve Act of 1948 is violated by the dismantling and selling and disposing and removing of the machinery and equipment that makes up this ship-repairing installation, which was formerly the West Yard over there, and that this is a proper proceeding to ask the Court to issue a preliminary injunction.

At this time, your Honor, I will not go any further in answering, in anticipating counsel's arguments that I am sure that he intends to make on the motion to dismiss. This is by way of a preliminary statement and by way of a statement as

to what we would intend to show on a hearing for a preliminary injunction.

Much of this is covered in our affidavit and exhibits and we have witnesses from the War Assets Administration and from the Bureau of Ships in the Navy that we could call. I believe counsel will stipulate that it will be necessary to call witnesses from Moore Dry Dock or Lyko Company to show machinery and equipment has been sold and delivered within the past sixty days or thirty days, the Government contends violation of the National Securities Clause.

Mr. Neblett: If the Court please, I desire first to pass to the Court our motion to dismiss, which is, of course, based entirely on legal conclusions. On the question of evidence, if the Court should deny the motion to dismiss, we will present our arguments and evidence later, on the [10] evidence if developed, by the affidavits and evidence produced here in the hearing.

At the opening of my argument, and in order that the Court may fully understand the location and the property described, I have asked counsel for the Government to let me present to the Court the photostatic copy showing the relative location of this property which was purchased by Oakland Dock and Warehouse Company from the Government, and also the detailed map of the property, and I will present those with the consent of counsel for the Government, offer them in evidence on behalf of the defendant.

Mr. Peckham: Yes, your Honor, I understand

these are the maps furnished originally by the War Assets Administration. They are copies, photostatic copies, of those, aren't they?

Mr. Neblett: That is right.

Mr. Peckham: Yes. There is no objection, your Honor.

The Court: That may go in evidence and be marked Defendant's Exhibit A.

(Whereupon the map above-referred to and marked Defendant's Exhibit A was received in evidence.)

Mr. Neblett: This is a map, a photostat, your Honor, which I think is probably A, and the other one would be B.

The Court: All right, the photostat will be marked.

(Whereupon the map above-referred to and marked Defendant's Exhibit B was received in evidence.) [11]

Mr. Neblett: I believe in my opening remarks that I should say something to the Court specifically about what the National Securities Clause is. Along in 1948 the question arose as to what would be done with a great deal of these, great number of these surplus plants which were scattered throughout the nation. They consisted of shipyards, ammunition plants, tank manufacturing plants, aircraft engine manufacturing plants, and also plants which had to do with manufacturing of war equipment. All of these plants had been transferred to the War Assets Administration for the purpose of selling or dispos-

ing in some form. They were, of course, of great expense to the Government to hold them. They were deteriorating very rapidly, but some persons, particularly the three services, got together and, I mean, the Army, Navy and Air. At the time of this, got together, as I said, and decided to hold some of these plants for sale with the idea in mind that they would be used in a future emergency.

This all happened in the so-called Unification Act which was passed; that was passed in July of 1947. I might say to your Honor that I spent more than a year working on that Unification Act at the staff level in Washington as a commander of the Liaison Division in the Air Force, so I am quite familiar with the Unification Act of 1947, properly known as the National Defence Act of 1947. [12]

Your Honor will recall of reading about that Act at the time. That was the first time in history that the three services had been combined into one unit, so to speak, in which the Secretary of Defence was the head. The office of Secretary of Defence was created by that Act. The integrity of the Army and Navy were preserved. The Air Force was split away from the Army and was made into a separate department.

After that Act had gone along and administered for a while by Honorable James Forrestal, who was appointed the first Secretary of Defence, the Army, Navy and Air, all got into a squabble about what they could hold, and this property which had been transferred to the—these plants which had been transferred to War Assets for sale, the Army was contending that the Navy was privileged over the



Army and the Air Force contended that some fields which they had should be retained, and it was a matter which was largely in the hands of the Secretary of Defence.

I am sorry that I don't have the reference to the Code of this Act of which I have a printed copy before me, but I can get it for the Court.

The Court: You have it there, Mr. Peckham?

Mr. Peckham: Yes, this is the '48 Act.

Mr. Neblett: Now, you are talking about Public Law 883, which is a 1948 Act. I am talking about the National Securities Act of 1947, because that is the start of this proposition. [13]

I think I am going into some detail, your Honor, but I doubt if I can explain the National Securities Clause to your Honor without going into this detail. The National Securities Act of 1947, the so-called Unification Act of the armed forces was approved July 26, 1947. In that Act there were Section 201, the National Military Establishment was, of course, first organized; Section 202 of the Act provided for a Secretary of Defence who would be the head of that department and his general powers were to administer the other three departments under his control. His powers have been very greatly expanded by the amendment to the National Securities Act of 1949. But that came after these transactions we are discussing now and I think it has no application for that reason.

One of the principal reasons we had for working out—I mean all of us who worked on this Act—it doesn't bear too much resemblance to the one we



prepared in the Department of the Air Force, Army and Navy at that time, because Congress hashed it up pretty badly when it got before it. But the principal thing, that was the form of it, unification of the armed forces, was that it would save money. There was a lot of talk to the public about we are starting another Pearl Harbor and all that, but that is just the atmosphere in order to get the public interested in going along with unification.

The Unification Act, as first suggested to the Congress by President Truman in 1945, in a message to the Congress in December of that year, and then all the sections went to work and finally came up with an Act which Congress worked over for a little over a year, 18 months, and finally passed it in the form that it now bears. As I said before, the business of having the Secretary of Defence in an overall command, so to speak, was to take away from the generals and admirals holding on to so much property they would never have any use for and to save money for the government.

In the Industrial Reserve, which counsel for the Government has told your Honor, there is \$9,000,000,000.00 of cost price property—\$9 billion dollars—and most of it is in a tumble-down, worn-out, dilapidated state and rapidly deteriorated since they were closed in 1945.

Well, the Secretary of Defence, his powers in the first Act are mostly financial and property. He had very little, he had no power on strategic concepts in either one of the three services created by this Act. In 1948—I am going to attack now the motion to

dismiss the complaint—1948 what is known as the Industrial Reserve Act was passed and that is how the National Industrial Reserve was created. That is known as Public Law 883, 80th Congress, and found in the Sections given you by counsel for the Government, 50 USEA, Appendix—it is in the Appendix, Sections 451 to 460. [15]

Now, that Act was approved July the second, 1948. That is an important date in connection with the allegations in this complaint.

At this time when this Act was passed and when arguments were going on before Congress, there was that idea in the air in which the Navy would hold everything it had, whether worthless or not; the Army the same thing and the Air Force would do the same thing. In the investigation leading up to the Act for its passage, 6,000 McClellan saddles, cavalry saddles, were found in Honolulu held by the cavalry for use in some future war. I don't know what they were going to do with these. I call the fact, I just mentioned the fact, that there is lots of property which was just about as useful as these cavalry saddles, although the cavalry had been abolished, or put the cavalry on wheels by this time, the horse cavalry had been abolished.

There was a great deal of publicity in the papers around Washington, each contending for its place in the sun and holding on to this equipment, land and other properties which they had scattered throughout the nation, of which Oakland Dock and Warehouse Company, known then as the Moore Dry Dock, West Yard, was a part.

There is a great deal of confusion in the pleadings. I hope your Honor does not think I am facetious when I say why there is so much confusion in the pleadings, is that [16] those were drawn in Washington. I hope your Honor will pardon me, I don't mean to be facetious, I don't, I am stating a fact. The affidavit is clear enough, I think that was probably drawn here. I can tell that was drawn here because it is on lined paper, I know the rules here, it is on lined paper.

Well, then, I shall go into my motion to dismiss with the consent of the Court. Here we have Public Law 883. This establishes the Industrial Reserve. Nobody claims we had any Industrial Reserve prior to Public Law 883 established, approved July 2, 1948. Now, that law says that the policy of Congress is that, Section 2, that the United States be provided adequate measures wherein the effectual nucleus of government industrial plants and equipment may be assured for immediate use to operate the needs of the armed forces in time of emergency or in anticipation thereof. It is further the intent of Congress that such government-owned plants and such reserves shall not exceed in number or kind the minimum requirements for immediate use of a national emergency.

Why was that put in there. I might say to your Honor that I sat in some of these, in on this testimony in connection with this Act, and was quite familiar with it while it was going on leading up to its passage. And the reason that the government-owned plants and such reserves shall not exceed in

number or kinds the minimum requirements for emergency use in time of the national emergency was due [17] to the fact it was known at that time what a terrible weapon the atomic bomb was. It was known at that time that we had attained in over-running *Germany rocket*, which is known as the Trailer or Seeker Rocket, has about 500 miles range, and has an average speed in a trajectory of 3500 miles an hour, and you fired it on the ground in the general direction of an airplane and knock it down like bird-dog retrieving a partridge, by an electrical control guiding it to the target.

It was known that we had a hollow shell and cannon to fire which will if—you don't have to fire it against something, but take 6-inch shell and lay it on the—sit it down and set it off and it will go 18 inches of the best manganese steel armor in the world and 48 inches of concrete. And then we also knew that we had attained from the Germans the B-2, which is an ideal atomic bomb carrier, you don't have to send anybody with it, it too has a speed of 3500 miles an hour in its projectory and its range is limitless with certain additions to fuel.

The reason Congress put that in there was to keep these services from holding a lot of stuff that wasn't worth anything to anybody, and that is the position we are in now. We are spending \$15,000,000,000 a year to maintain a force which is 1/40th, 1/40 of which goes to these weapons I am telling you about. So that was established as a policy, the [18] minimum requirements in time of an emergency.

Well, it is known now that we will never build



another ship of the type that was built in this yard. I am going into that a little later, but leading up to it, going to Public Law 883, to keep these services from getting and holding on to all these plants individually, the Act placed sole responsibility on the Secretary of Defence. That was the reason for it. They knew that the generals in the Army would hold on to everything they had. And now, I like all those gentlemen, who are all my friends, from the top down, personal friends, but I don't agree with on the defence set-up they have and I have said in other forums besides this Court, and coming down to 1948, the Navy was trying to hold on to the shipyards, the Air Force was trying to hold on to the airports, and its planes of World War II vintage, and the Navy was trying to build carriers and so forth, and the Army was building a lot of tanks, so the Congress finally said this is all confusing so we will place this responsibility solely on the Secretary of Defence. And what happened?

Paragraph 3C of the Act provides that the term National Securities Clause, as used herein, means those terms, conditions, restrictions and reservations heretofore formulated or as may be formulated in Section 42 hereof for insertion in instruments of sale or lease of property determined in accordance with Section 41 to be a part of the National Reserve [19] which will guarantee the availability of such property for the purpose of National Defence at any time when availability thereof for such purposes shall be deemed necessary by the Secretary of Defence.



Now, Section 4 is very important. To execute the policy set forth in Section 2 of this Act, the Secretary of Defence is hereby authorized and directed—I emphasize those words—authorized and directed, 1. Determine which excess industrial properties should become a part of the National Industrial Reserve under the provisions of this Act; and 4, designate what excess industrial properties shall be disposed of subject to the provisions of the National Securities Clause.

Now, one of our main points on this matter, your Honor, is that the Secretary of Defence——

The Court: I didn't hear that.

Mr. Neblett: One of our main points is that Secretary of Defence has never designated, has never determined that the Moore West Yard should be in the Industrial Reserve. He has never made the determination.

And number 4, sub-paragraph 4, that has never been designated that excess industrial property, namely, Moore Dry Dock West Yard, to be disposed of subject to the National Securities Clause. Never did determine one of those. So we start on no case whatsoever on the part of the government. Why do I say it? We *will the* allegations of the complaint. The [20] allegations of the complaint are—keeping in mind that the Secretary of Defence is the person authorized to do that. And now, I have collected quite a few cases, United States Supreme Court, California, and some others, all of which hold that when a particular officer is designated to exercise discretion under an Act of a Legislature that his

powers cannot be delegated. I don't mean by that, your Honor, that the Deputy Secretary of Defence couldn't do it. I don't mean that, because we know a Deputy may exercise the prerogatives and discretion of his principal, but the Secretary of Defence could not delegate his authority under Public Law 883 to the Munitions Board. I have the cases here, quite a few of them.

The Court: Are they in the brief connected with this motion to dismiss? Are those cases you are just about to refer to in the brief connected with the motion to dismiss?

Mr. Neblett: Not these two or three I was going to give your Honor at this time. They are not in the points and authorities.

The Court: Yes.

Mr. Neblett: These three, I'm—the first one, the first statement is from 46 Corpus Juris, page 1033, section 291: "An officer to whom a discretion is entrusted cannot delegate the exercise thereof."

That principle is upheld very strongly in the old case of [21] Stockton against Creamer, 45 Calif. 643.

One of the best cases on the subject is Ontario Knitting Company against the State of New York, 205 New York 409, page 416; 98 Northeastern 909. A strong case, U. S. Supreme Court, Gaines against the Secretary of the Interior, 7 Wallace 347, 19 Law Edition 62. Another case on the U. S. Supreme Court is York against the Secretary of the Interior of the United States, 275 U.S. 175, 69 Law Ed. 561; and an Aide Society against Reis, 71 Calif. 627 at page 634 it is said: "When a discretion is by law

conferred on a specific officer, said officer must exercise that discretion personally.”

It is alleged in the complaint that on June—July the third, 1948, the day after Public Law 883, the Industrial Reserve Act, went into effect, that the Secretary of Defence delegated all of his powers and authorities under him to the Munitions Board. And that we contend he had no authority whatever to do under Public Law 883, because the discretion was wholly in him as Secretary of Defence. But the greater fault in that appears in the complaint. The complaint alleges in effect that this property, Moore Dry Dock West Yard, was designated as a part of the Industrial Reserve. Well, that designation came on, that designation of which they claim came on April 8 and May 7, 1948, before the Industrial Act was ever passed, the Reserve Act was ever passed.

There isn't one word in this complaint that after the [22] Industrial Reserve Act was approved, July 2, 1948, that this property was ever designated by the Secretary of the Defence as a part of the Industrial Reserve or that it should be sold subject to a Securities Clause. Not one word. They do set up a letter—they do allege that it was designated before the Industrial Reserve was created, and how was it designated? By a trust release. All we have to sustain that is a trust release. Now, of course, if we get into the evidence of this thing I am going to object, and I think with some force, to the admission of such things as trust releases put in evidence to establish a discretion.

What do we have? We have this trust release

here dated April 8, 1948, for immediate release and it says—it is attached as an exhibit, it is a part of Exhibit 2 to the complaint, and it starts out, War Assets Administration Memorandum. The following is the text of the statement issued by the Assistant to the President April 8, 1948, for immediate release.

I know that the Military Departments have gotten so that they think they can do most anything, but I don't think it is to be believed that they can pass, make directives which affect the property of the citizens of the State of California and any other state of the union by issuing a press release. We have gone a long ways in government and [23] have made a lot of changes, and I have been following in those changes myself, but I never have gotten down to the point where we could determine the discretion by some other public official by a press release when the Act under which the authority was created hadn't been passed until three months later it was passed.

The next thing that they claim is that this press release issued—the Assistant to the President of the United States, don't say who it is. Everybody doesn't know who the Assistant to the President of the United States is. He has a lot of assistants. Now, a letter, which is Exhibit 2 to the complaint, which I wish your Honor would refer to, and it is a letter written by P. W. Timberlake, Major General United States Air Force, in which he tries to make disposition of some property belonging to the Navy. I am a pilot with long experience in the Air



Forces myself, and I know how we were treated by the Navy and we know how we treated the Navy, so I don't hardly think this is—from that standpoint maybe I am getting facetious again—but that letter is written on the Military Establishment Munitions Board of Washington.

Now, who in the world is Timberlake? I happen to know him personally, I have known him for years, but who is he? He is one of 650 who hold General and Admiral ranks in the Army and Navy and Air Force today. Six hundred and fifty of them. I might as [24] well have signed that when I was there, when I was in the Liaison Division of the Air Force. I could have signed that William H. Neblett, U.S.A.F., and have just as much effect as this has, and besides, that was creating a reserve under an Act which hadn't been passed.

The Court: I notice that it says attached hereto the tentative list of 114 facilities now considered necessary in the national defence and as a consequence should be disposed of under the National Securities Clause conditions. It is for the National Securities Clause conditions, those contained in the Act in 1948?

Mr. Neblett: Well, that is a Securities Clause under which we bought the property, that is the Act of July 2, 1948. The Act hadn't been passed.

The Court: I understand, but I am just asking, the National Securities Clause conditions referred to therein, were they in effect previous to the Act of July, 1948, in any way?



Mr. Neblett: There was some property that had been sold under the National Securities Clause which rose under Public Law 34, which I think is referred to here in one of these documents, 634, which is referred to in the press release of April 8.

The Court: What is the date of that?

Mr. Neblett: That Act, that law was—my recollection [25] is that law was passed some time in 1947. I have a reference to it here somewhere, but it is Public Law 364 of the 80th Congress. Congress passed it in 1947 prior to this date.

The Court: And did it provide for the Securities provisions being inserted in bills, say on deeds, and so forth?

Mr. Neblett: It did in effect, your Honor, provide for that; yes. The Public Law 364 was quite different from Public Law 883 and it was the unsatisfactory condition of Public Law 364 which led to the adoption of Public Law 883. That was called a leasing act. It is known as the Industrial Leasing Act for the armed services and as I said, my recollection is somewhere in the middle of the year 1947; I don't remember the exact date. But Public Law 883 came along and that law specifically placed it all under the Secretary of Defence; Public Law 364 did not. The Secretary of Defence was not mentioned in there. It was only the War Assets that could sell it subject to the Securities Clause.

The Court: I understand your first point to be at the time that this act was—July 2, 1948, was an act under which these properties were to be des-

ignated and that there wasn't any designation made of this particular property or any designation that it should be disposed of with the security clause in it; that is correct, isn't it? [26]

Mr. Neblett: That is so, I mean, no designation made after the Act was passed.

The Court: After the Act was passed.

Mr. Neblett: That is correct.

The Court: And your claim is then that therefore even though those provisions were in the bill of sale that that wouldn't be binding upon you, is that correct?

Mr. Neblett: No, sir, I don't contend that. I think, I believe that if the—well, I will withdraw that statement and say it this way: There was no authority to put it in the bill of sale if the property was never designated by the Secretary of Defence, because that deed was a year after, a year after Public Law 83.

The Court: Suppose there had been no law of that kind at all and no law creating any of the security provisions; suppose you people come along and made a deal with the correct Government officials to take over this property and took it with certain conditions, wouldn't those conditions still be binding?

Mr. Neblett: Yes, your Honor, no doubt about that; you are right about that. That is another point. I think that the Government—what I am making this argument is that the plaintiff alleges that what we have done violates the public policy as established by Congress in Public Law 83, and

I am making argument to show that no public policy has been established [27] with respect to this piece of property under Public Law 83. That is my purpose. Then, the most substantial point I have is that the conditions and bill of sale mean nothing.

I agree with the Court that if the Government had the restrictions, conditions in the bill of sale, regardless of any security clause, if they were good conditions, the Oakland Dock and Warehouse Company would be bound by it, but there hasn't been much disagreement: I don't like to refer to arguments I have had outside of the courtroom, but I think I am justified in, since I have shown it in the affidavit anyway, that we discussed this matter considerably back in Washington in the last two weeks with the Navy Department and with the Attorney General's Office, and I might say that they, I will say that they were fairly weak on the point that the conditions and restrictions don't mean anything unless coupled with the idea of public policy, and I think it was due to my talks to them that they put in here, tried to show that the property had been designated and therefore one general overall public policy which transcended the laws of California with respect to California and transcended all Constitutional provisions which had to do with contracts or rights, because this was a contract matter with the Government.

Now, that is what I think that was the reason it was put in the Complaint.

But our main point here, your Honor, is that after

meeting [28] this, I think tried to meet this public policy point, our main point here is that this is a complaint brought to enjoin the sale of property, personal property.

I might cover the facts a little bit here, because I don't see how Counsel for the Government became as familiar with them as he did with the short time he had to work on them and there may have been a few errors in his statement which I would like to point out. The Moore Drydock Yard consisted at the beginning of about 96 acres; something like that. Around 52 acres of it, the west portion was owned in fee by the Government. The Government acquired that in fee by purchase with some conditions. That is the piece that the Oakland Dock and Warehouse Company bought. The eastern portion, or about 44 acres, say, is owned by the Western Pacific Railroad and is under lease from the Western Pacific Railroad to the United States Government on an annual lease with provisions for renewal and we contend that the lease is void for certain reasons that is not part of the Complaint.

Now, the Government tried to sell this whole yard of the Western Pacific Lease upon which ways are built, and the ships were floated next door to the part now owned by Oakland Dock and Warehouse Company and there are what they call outfitted. It has six piers on it and the building ways, are five building ways and six outfitting piers. While the Government tried to sell it all in one bunch, but it wasn't able to do it because [29] nobody would take over the Western Pacific lease. Then finally the



Government split a part of the yard into the fee portion and sold the fee portion at public auction to the Oakland Dock and Warehouse Company. Negotiations were going on about a year between the various parties before the Oakland Dock and Warehouse Company actually purchased it.

And the security clause mentioned in General Timberlake's letter was applied to the whole yard, but never applied to the whole part the Government sold to the defendant. On that point I repeat myself, because of the hounding I took in Washington. This was something different. It was a great policy established by Public Law 883. The public policy argument doesn't count.

Now, I would like to say one other thing I didn't cover. When the Government conveyed this property to Oakland Dock and Warehouse Company—I am quite familiar with it, because I handled it for the company and sat in on the conferences and was also the one who approved the title instruments which were finally given us. This is an unusual transaction in that the Government, usually in the sale of its industrial equipment and lands, the Government makes a combination quit claim deed and a bill of sale, and then takes back a trust deed on the whole for security of the balance of the purchase price, if it isn't all paid at once. Our company didn't pay it all at once. It paid actually \$240,300 in cash and gave back a note for \$961,200 with 4 per cent interest payable in twenty equal annual [30] installments of \$48,060 each, interest



and principal payable on June third of each year in equal installments. So a quit claim deed was given to the company for the real property and the improvements on the real property, that is real property by description. And a security clause of certain—that was void in itself. We don't have to go into that because that is not involved. The security inserted in the quit claim deed in which the Government said in its quit claim deed it reserved dormant estate for twenty years. Frankly, I am probably quite a bit older than your Honor and I have practiced law for a long time, but that is the first time I had heard of a "sleeping estate." I don't know what it means, but anyway that is what it said. And all the law experience I have had that is the first time I have heard it.

Then we had the Government give us a bill of sale to the machinery, tools and equipment separate from the quit claim deed. Now, we gave back a deed of trust on the real property to secure the whole note, \$961,200, and also gave back a chattel mortgage to secure the note on the machinery, tools and equipment with release provisions on the chattel mortgage that all this equipment would be released upon the payment by the purchaser of \$366,660, which was established by the Government in the chattel mortgage as a fair value of the property.

The Court: You mean a partial release, or a general release?

Mr. Neblett: That was a general release. I think that [31] is so important I might read that to your Honor. That is exactly what that clause provides.

It is paragraph three in the chattel mortgage. It reads as follows: "The mortgagee agrees"—the United States Government—"to release all the chattels from the lien of the chattel mortgage upon the payment by mortgagor to mortgagee the sum of \$366,660, which sum has been established as the fair value of said chattels. The mortgagee will also release a part or any portion of said chattels upon the payment by the mortgagor to mortgagee of the fair value (fair value to be established by mortgagee) of the property to be released. All payments so made shall be applied against the unpaid balance of the total indebtedness of \$961,200 in the inverse order of maturity, as specified in the terms of the promissory note of even date."

The Court: That is a partial release, of course.

Mr. Neblett: Yes. That is what the Government complains about. We have been obtaining partial releases from the Government right along by the payment of the fair value which they established on the equipment released. We have filed, by the General Services Administrator, the releases recorded; that is what the Government is complaining about.

But now to go back to the form of this argument I wish to——

The Court: It is 12:00 o'clock and I have a conference with two of my colleagues about another case at a quarter after 12:00, so I think I will have to continue this matter until 2:00 o'clock. We will recess now. [32]

Mr. Neblett: Very well.

(Adjournment until 2:00 o'clock p.m.)

Friday, June 16, 1950—2:00 o'Clock, P. M.

Mr. Neblett: I would like to open my argument this afternoon by asking your Honor to turn to the Complaint and particularly Paragraph Three. This morning, Counsel for the Government mentioned the fact that the quit claim deed on this property had been modified. That is correct. His date was in error. The date was February 28, 1950, that the new quit claim deed was modified, the quit claim deed was executed by General Services Administration.

As your Honor knows, this property was sold to the Government and the deed executed by the War Assets Administration. The War Assets Administration, the Act under which the War Assets Administration operated was repealed as of July the 1st, 1949, and the General Services Administrative Act took its place, and the General Services Administration now has all of the functions that were formerly conferred upon the War Assets.

This bill of sale which is attached to the Complaint and possibly quoted in Paragraph Three of the complaint, is the instrument upon which this action turns with the assistance, say, of the chattel mortgage.

The Complaint in general is a complaint for an injunction and it has the prayer for damages, but no damages alleged in the Complaint. I don't know just how, in our motion to dismiss, I should go on arguing the questions of injunction, but we do [34] know that in California——

The Court: In California, in any other equity,

the rule is, one of the essential things to show in an injunction case is irreparable damage during the delay. That is one of the things, isn't it one of the elements?

Mr. Neblett: Yes.

The Court: Other elements, of course, bearing on the question of convenience or equity, you might say. Is there any allegation in the Complaint to the effect that this defendant in this case is insolvent and unable to pay any damages that might be secured by virtue of any violation of the contract?

Mr. Neblett: No; no such allegation and no such allegation could be sustained if it were made, so I think that is why it wasn't made.

The Court: Of course, it may be claimed by the Government that this reservation here was for the purpose of enabling that plant to be put into immediate war time use in the event of any national emergency, and if you people keep on selling off this equipment and these machine tools, it may not be in the condition that they want it contemplated by the reservation in the bill of sale. That would be probably irreparable damage. It might be.

Mr. Neblett: That is the policy, the national policy on which I tried to reach this morning.

This Complaint first sounds—is plainly—the purpose [35] of the Complaint is to prevent what the Government calls a breach of contract. We say there is no contract which we can breach and that I am going to argue in a moment, but to start off with, this injunction is purely sought for that purpose.

Now, Section 2423 of the Civil Code of California,

Subdivision 5, says: "An injunction cannot be granted"——

The Court: Which Section is that?

Mr. Neblett: 2423 of the Civil Code, and it is Subdivision Fifth. That reads: "An injunction cannot be granted:" —for certain reasons expressed in first, second, third, fourth and fifth—"Fifth, to prevent the breach of a contract, other than a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for such service is at the rate of not less than \$6,000 per annum and where the promised service is of a special,"——

The Court: That was to cover the movie business.

Mr. Neblett: No use of my reading any further. We know when that was adopted and the reason for it, and the general proposition and the specific proposition is that an injunction cannot be granted to prevent the breach of a contract. That is all this section is, is to prevent the breach of a contract.

No damages have been alleged in the Complaint. However, there is a prayer for damages attached to it, not any stated amount, but a prayer for damages. I suppose that Counsel for the Government will go along with me on the theory that the [36] prayer is no part of the Complaint. The allegations in the Complaint are particularly for injunctions, further breaches, or alleged breaches of this contract, namely, the bill of sale.

We, of course, contend that there is no breach of the bill of sale and our reason for so contending—reasons for so contending is that the bill of sale



provides that the War Assets Administration, acting pursuant—the War Assets, the United States of America through the War Assets, acting pursuant to reorganization plan one of 1947, and the powers and authority contained in the provisions of the Surplus Property Act of 1944 and the W.A.A. Regulation No. 1, as amended, “does hereby sell, transfer, assign and deliver unto Oakland Dock and Warehouse Company, a corporation duly organized and existing under the laws of the State of California, vendee, the following described chattels:”

And it describes the chattels, that description is not specific, but that agreed description that we, the War Assets and the defendant here, the vendee, knew what it was, and no question of description of conveying on that piece of property or of the chattels, which consisted of machinery tools and equipment to the vendee.

We were discussing Public Law 883 this morning, but your Honor will see that no mention of Public Law 883 is made, and that is a propos, and the question that was asked just before we left, if there had been no documents and still the Government had conveyed it upon us, upon the chattel mortgage valid [37] restrictions, that the restrictions would be of *just much* force and effect whether there was any Public Law 883 or not. I think that is a propos of the allegation made by the Court.

“Said chattels were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and W.A.A. Regulation No. 1 as amended.”

There is no question about the fact and no question raised in the Complaint, anywhere else—in fact, it is alleged that this quit claim deed, or this bill of sale—I don't mean the deed, the quit claim deed is not involved; it might be in evidence, but not involved in this motion I am now making. And this quit claim deed conveyed all of the right, title and interest of the Government into these chattels, to the vendee, the Oakland Dock and Warehouse Company.

Now then, I think it is necessary to read some of these paragraphs. Well, before that: “to have and to hold the same unto the said vendee, its successors and assigns, without representation of warranty, express or implied, as to title or condition thereof, subject to the following covenants, restrictions, conditions and reservations:

“One. The Government-owned portions of the Moore Dry Dock Company West Yard, Oakland, California, hereinafter referred to as the ‘plant’ in which the above-described chattels are located, is considered a War Reserve plant and as such will be of vital interest to the Nation in the time of emergency.” [38]

Well, that recital is a rather vague one. Then it recites that the ground which was conveyed to us is a War Reserve plant. In other words, the ground which was conveyed to us is the plant in which the above-described chattels are located and considered a War Reserve plant.”

Now two. “Two. In a quit claim deed, of even date, and delivered concurrently herewith, whereby

the vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the vendee herein, the vendor herein has reserved a dormant estate in said plant, for a period of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each."

Again referring to the real property which was conveyed and not to the machinery, tools or equipment, no reference to them. I am trying to point out to your Honor the Government hasn't reserved any right to that, to take back this property. I can't find anything in the bill of sale which gives the Government any right at any time to take over possession of this property.

The Court: I was the attorney for the Bank of America for twenty-five years before I came on this bench a year and a half ago. I never in all that practice, never heard of a dormant estate. I don't know what provision of the law under which that is created, exists; never heard of it in Blackstone, or in any real property book I have ever read. [39]

Mr. Neblett: My experience has been the same as your Honor. This is my first acquaintance with the word "dormant estate," I have never heard of it before I came in contact with it here, and of course, I contend that it is a term that isn't definable in law. I suppose it means "sleeping estate." That is what the word dormant generally means, something generally asleep.

The Court: Reserve the right to forfeit the estate granted in the event of violation of conditions subsequent, and you can do all those things, but what a dormant estate is, I don't know. Maybe Mr. Peckham will be able to enlighten me.

Mr. Neblett: I would be delighted if I could, but I have studied this question very diligently. I don't know whether I understand it better than anyone else, but I do claim I have studied it harder than anyone else, this whole problem, and I have been unable to find anything that remotely defines in any dictionary, any case. I have looked it up very carefully and I don't know what dormant estate means. You can find in the law definitions of a dormant person. It means a person that is in a state of—well, it is a sort of amnesia or sleeping sickness, or something of that sort. That is the way to define a dormant person, but the dormant estate——

The Court: At any rate, you are making the point now there is nothing in this bill of sale which gives the Government the right to take it back? [40]

Mr. Neblett: That is correct, your Honor.

The Court: No reverterary interest of any kind.

Mr. Neblett: No sir, just—here is the only restriction upon which this suit is borne. That is found in Paragraph Three.

“Paragraph Three. The vendee for a period of ten years from the date hereof——” that is June 1, 1949——“will not, without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which Department has jurisdiction,”—let me stop right



there and say these three Secretaries, it is evident from Public Law 883—neither one of those Secretaries have any jurisdiction, so that means the Secretary of Defense, of course. My construction of it is that one of the Secretaries, means that the Secretary of Defense, but we haven't seen any action on the part of the Secretary of Defense.

Quoting further: "sill not, \* \* \* remove, sell or dispose of any of the machine tools or other severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or other severable production equipment,".

Now, that is a very vague paragraph, but it means that within the discretion of the vendee that he can sell anything he [41] wants, provided he complies with the chattel mortgage provisions. We don't contend we could sell without the release of the chattel mortgage, because the chattel mortgage holds it until a partial release is made to the satisfaction of the Government. Now, that means that we can dispose of anything we want to unless in our judgment the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed. Doesn't tell us what the plant was designed for. I suppose you would have to have evidence to support that, and unless replacement is made by equivalent machine tools or other severable production equipment. That would give us ten years in which to put it back. We would have ten years in



case we sold anything and it materially reduced the capacity of the plant, no showing it would do, plus we would still have ten years to put it back.

These things are the three paragraphs on which the suit is brought is quoted in the bill of complaint. They say the suit is founded on those.

The general conclusion as alleged in the Complaint that this sale of the equipment which the company has sold and for which it has obtained releases from the Government, partial releases from the chattel mortgage, the general conclusion as alleged in the language of the bill of sale that it would materially reduce the capacity of the plant to produce items for which it was designed and the replacement will not be made— [42] now, that puts that paragraph, seems to open it up, states no cause of action unless it were stated how it materially reduced it, the capacity of the plant, to produce the items for which it was designed, and the Government couldn't state this because this plant, this plant of a shipyard which was sold and split apart from the other half, can't produce anything. That is the reason the Government didn't allege that it materially reduced the capacity of the plant.

You see, your Honor please, the security clause has been placed on this plant, placed on the whole plant, and the ship building plant, and this is only half of the plant which builds the superstructure of the ships, as the hulls are built on the other part, the Western Pacific land and therefore, the plant this machinery wasn't designed to produce anything in the way of ship building or ship repairing, because

it is impossible to build ships. I mean, you have no ways there and there are no ways, only outsticking piers. The question comes up, when do we have to replace it? We have at least ten years unless replacement can be made, I think is what the contract means. But that again is just to point out to your Honor the uncertainty in the whole proposition, and the main point I want to make is that conditions against reselling where absolute title is conveyed is void in anybody's law. There is no exception to that. I have talked to the Department of Justice, the Department of the Navy and we have talked about this thing time and time again. [43] I asked them to produce any authority which shows we are wrong about that. And to date none have been produced. I am talking about the Department of Justice in Washington. I have talked to them about it, I have produced cases which I am going to give your Honor now, and over a period of years we have been discussing this thing. Up to this time I have received not one authority that we are wrong.

Now, I am not saying this about my friend here, because Counsel for the Government, because I never met him until yesterday and he had the case very shortly, and I understand it was sent out to him about a week ago, and he naturally showed a great familiarity with it this morning in the short time he had to work on it.

This sets out the authorities we have cited in our motion to dismiss and it is based upon Section 711 of the Civil Code: 711. That Section reads: "Conditions restraining alienation void."

The Court: That is under the real property Sections?

Mr. Neblett: That is true, your Honor. But back in the Code it is said that property includes personal property and everything else. I can go in that further and show your Honor that property includes both real and personal property. That is so stated in the title of the Code in the beginning. I can look and find the Section that is necessary, but there is a New York case that holds that no conditions can be put upon [44] personal property because of its transitory character. I don't find any such cases as that in California, because California in the Codes lumps property into one element. I do find in California that sales of personal property with restrictions can only be made where there is a conditional sale and title is retained in the seller until the purchase price is paid. But there is no such thing known to the law of California where anybody has ever tried to impress restrictions, real estate restrictions on personal property because of the transitory character, I believe.

But that reads: "Conditions restraining alienation, when repugnant to the interest created are void."

No question about the fact that interest created here is absolute title as alleged in the Complaint, that the title was made to the vendee. And here we have some machinery over there which it is common—I think the plant was built in 1942—and it is common knowledge that plants of that type were supposed to have a life of four years. That is, the

Navy's estimate of complete depreciation on a plant of that type—four years. The plant is now eight years old. It has served a double life already. The civilian—it is common knowledge that civilian depreciation on that allowed on plants of this type, allowed by the income tax people, is seven years. The income tax department permits you to depreciate such machinery, tools and equipment and plants of this type in seven years, complete [45] depreciation. The Government is twenty-five per cent a year—I mean, the Federal Government, the Navy Department and so forth, but this other branch, seven years' life by the Treasury Department.

The only thing we have here is a complete conveyance of title and they are trying to tell us what they are going to do with it, can't sell it, can't dispose of it according to them, let it stay there for ten years. By that time it would be worth nothing to anybody. In the meantime we pay taxes.

The Court: There might be something in what you say in regard to real property, but I am not sure that that rule of the repugnancy to the transfer and delivery is applicable to personal property.

Mr. Neblett: Well, I think your Honor, that I can answer that question.

The Court: Couldn't I transfer some shares of stock that I own to one of my children and still provide in the transfer that while they have the absolute title they can't sell them for ten years and they shall pay me during that ten years, pay me the dividends therefrom?

Mr. Neblett: I think that would be a father and



child agreement, if the child would observe it, the child probably would observe it, but if you conveyed I think possibly that would be a little better if it was outside of the family, because that would involve family agreement. But it certainly, [46] if you conveyed to me some stock the restriction would be invalid. That is, if you, as a fatherly consideration, that I was to pay the dividends, that would be another point, because that would be giving me an estate——

The Court: I would be giving you a remainder of that estate, ten years, that would be.

Mr. Neblett: And you reserve the dividends for the ten year period?

The Court: You agree not to sell the stock during that time. Nothing illegal about the transaction.

Mr. Neblett: I don't think that transaction is similar to this one, because in this transaction we don't pay the Government anything, the Government doesn't reserve the right to collect any money or anything. You reserve the right to collect dividends, which is an absolute reservation of a ten year estate for which that is a part of the consideration. But here we just have a blanket and very vague clause against resale.

The Government can never get the \$366,660 out of this, this entire personal property, because that is a provision in the chattel mortgage, for its release, partial and whole. I called your attention to the partial release and whole release section in the chattel mortgage this morning. The Government retains no interest whatever in it except to collect



the amount of money which is secured by that chattel mortgage, and the upset price, the top price of \$366,660, which is said to be the [47] fair value of the property on June 1, 1949. It isn't worth what it was on June 1, 1949, because it has another year's depreciation.

I think that I will turn back to this title of the Code to answer that question your Honor just raised. I have a case from California which I don't know whether I can lay my hands on right now, which says that the right and interest in personal property is the same as it is in real property. I mean, that is based on 654 of the Civil Code which reads: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others."

In this Code, the thing of which there may be ownership is called property. That is the same title under which 711 comes.

Now, Section 657 of the Civil Code: "Property is either:

1. Real or immovable; or,
2. Personal or movable."

So there is a case somewhere, I can't lay my hands on it right now, because I didn't think it was important. The rules under this Section, part one of the Civil Code covers both real and personal property and 711 comes in that division, as your Honor knows. So I believe that the cases with respect to real property are applicable for that reason to the personal property which I have just read to your Honor.

The Court: In that Code I think you will find, for instance, that you can't create a trust in real property except [48] by (life) and you can't create a trust for longer than the life of a person for twenty-five years, and you can't restrict the alienation of the property and create a perpetuity in real property, but I don't know of similar provisions with respect to personal property. In other words, you remember the old saying you can have a trust—you wouldn't have a trust to convey that was real property, but you could have a trust of personal property, create a trust in personal property by an oral agreement; you can't do that with regard to real property. Similarly, there are distinctions between real and personal property.

Mr. Neblett: Well, a distinction between personal and real property as to the creation of a trust arises out of the Statute of Frauds which prevents your creating an interest in real property for more than one year, whereas you can create an oral trust, you can make the agreements about personal property for more than a year provided you deliver——

The Court: So many decisions between real and personal property and the treatment thereof in the Code that I am just wondering whether or not the fact that this, these conditions in the bill of sale which seem pertinent to the transfer of title to the property, whether or not the provisions of the Civil Code make that invalid with regard to transfers of real property apply to transactions like this; if you follow me. In other words, one giving, dealing in personal property here, just [49] wondering whether the same reasons that might make a transfer of real

property with provisions make the bill of sale invalid.

Mr. Neblett: Undoubtedly the real property, the original deed, original quit claim deed, was void for the same reason, your Honor, undoubtedly. But the original quit claim deed with reference to the real property was modified and I think the modification is probably valid.

The Court: That is not what I am saying. You quoted me provisions of the Civil Code in the State of California which deal with real property and your arguing that these conditions in this thing being repugnant to the bill of sale are void; therefore, they are not binding on your client on the ground that they are repugnant to the bill of sale which you are—supposing you transfer absolute title to your client, and I am asking you if it might be true in respect to real property, that principle. I don't know whether it is true with respect to personal property or not.

Mr. Neblett: Well, I don't say that the case which says that there is no distinction between real and personal property at this moment, but there are such cases in California, no distinction under the Code, these Sections, Division 7, part one and two of that, real property and personal property, regulated by the same rules, 711, "conditions restraining alienation. when repugnant to the interests created are void."

Now, that—— [50]

The Court: That is, that deals solely with real property, does it not?

Mr. Neblett: No, your Honor, it deals with both, it deals with property, and those two sections I have just read to you——

The Court: Yes.

Mr. Neblett: ——say that property is either real or immovable or personal or moveable. That same title refers back, of course, this Section is made in the light of that Section 657. Section 711 follows 657, because it refers to what are real or personal properties, that is the way property is defined, and these restrictions are applicable to property in general, whatever its character. But I agree with your Honor that restrictions, conditions, covenants and so forth will occur in real property probably 95 per cent of the time that they do occur at all. I agree with your Honor on that because it is impossible, really, to make any sort of life estate in something such as a piece of machinery or something of that sort; it isn't good business to do it. I think that is the reason it doesn't happen any oftener, and, for instance, I sold an automobile to one of these gentlemen in the court now, and I conveyed it to them and he paid for it, I gave him the pink slip and he paid me for it, but I put a condition on the pink slip that he couldn't haul a trailer behind it and he couldn't drive it out of the County of San Francisco and he couldn't sell [51] it for a period of ten years, of course, that would be invalid on the face of things, even invalid in common law, regardless of the Code. And that is what Judge—Justice Henshaw said in one of these cases. Of course, this case was applicable to real property, but the language is very im-



portant. This is the case of *Bonnell versus McLaughlin*. It is 173 *California* at page 214. Judge Henshaw said:

“The deed of McMahon to these defendants was, so far as is here important, in the following language: For a money consideration expressed as being ten dollars, McMahon ‘does by these presents grant, bargain, sell, convey and confirm, unto the said parties of the second part, and to their heirs and assigns, forever, subject to the conditions herein named, all that certain lot, piece or parcel of land,’ etc. ‘This grant is made upon the express condition and limitation, that said second parties, or either of them, shall not sell, hypothecate, mortgage, convey, or alienate the whole or any portion of said premises during their natural lives, but they may make testamentary disposition of the same. Together with all and singular the tenements, hereditaments, and appurtenances’—and so forth.”

Now, the Court went on to say:

“The general demurrer was sustained by the Court under the conditions subsequent contained a restriction [52] repugnant to the grant itself, and of the soundness of its conclusion in this regard no doubt can be entertained. In this State it has been declared that when the granting clause in a deed purports to convey title in fee simple and is followed by a clause prohibiting the grantee from conveying without the consent of the grantor, the latter clause is repugnant to the interest created by the former,



and being in restraint of alienation is void.  
(Civil Code Section 711)''

and some other cases cited,

“the deed contained the proviso”——

quoting from another case——

“In Maynard versus Polhemus, the deed contained a proviso that if the grantee ‘should ever sell any of the vested property it should be sold to the said DePeyster.’ Says this Court, ‘construed as a covenant, it was merely personal, and not binding upon the heirs or assigns of Cooper.’ The condition ‘it is unreasonable, and contrary to the policy of the law, because in restraint of alienation.’ In Prey versus Stanley, the restriction was that the grantee should sell or convey no part of the land without the consent of W. H. Stanley. This restriction was not contained in the deed itself but was in form a separate covenant, this Court saying that the rule that conditions in restraint of alienation when repugnant to [53] an interest created are void (Civil Code, Section 711) ‘does not depend upon the mere form in which the restraint is imposed.’ It avoids as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of Section 711 of the Civil Code, are yet obnoxious to the policy of which that Section is a partial expression. The parties to the contract of February 23, 1892,

seem to have made the mistake of leaving the absolute title in Mrs. Stanley, and at the same time attempting to destroy an inseparable incident of said title.' As is pointed out in 24 *America and English Encyclopedia of Law*, Second Edition, page 868 et seq., and note to *In Re Walkerly*, 49 Am. St. Rep. 97, this rule is of well nigh universal acceptance. In the latter it is said: 'hence, if a deed or devise is attended with an expressed condition that the beneficiaries shall not sell or convey the property, no perpetuity is created, because the condition itself is void, and the fee and absolute power of disposition vests in him.' "

Your Honor would not be interested in any cases raising the rule of real property?

The Court: No.

Mr. Neblett: Because your Honor stated you are quite familiar with that and I think that is something which we are [54] all very familiar with, and of course——

The Court: The rule of restraint of alienation has been—comes down from Blackstone. We all ought to know that.

Mr. Neblett: Some question has been raised here that this property, we have raised, not here, but raised with me in all arguments beforehand, and I want to anticipate if I can. I have cases here to show, that this property, being in the State of California is regulated by the laws of California, and the law in respect to this property—I have had some objection to that in argument—but I have cases to

cite, many cases to cite, that cite the principal ones, they are cited in the motion to dismiss, in our points and authorities to dismiss—the principal ones being, well, I guess the best one is Los Angeles and Salt Lake Railroad Company against The United States, which was in 140 Federal Second 438, which was decided by the Circuit Court of Appeals of the 9th Circuit.

The Court: Let me have that citation.

Mr. Neblett: 140 Federal Second.

The Court: Page what?

Mr. Neblett: 438. But probably the leading case is Thompson against Magnolia Pipeline Company, 309 U.S. 476. Does your Honor have the Law Edition? Is that sufficient for your Honor?

The Court: That is sufficient, yes.

Mr. Neblett: Now, those cases and the other two were [55] cited in Paragraph three of the points and authorities on the motion to dismiss, on the motion to dismiss I stated the principle that the Federal Courts in a state, with respect to property, whether it is real or personal, with respect to that property——

The Court: I know that.

Mr. Neblett: Yes. As far as this point of digging up that case which holds that the rule is applicable to real and personal property being the same, I don't have that, your Honor, I don't have the citation here with me. I sometimes, I know we can have everything we can expect, but we don't run into something we hadn't anticipated.

The Court: Well, do you, so far as the purposes

of this motion are concerned, do you admit that the property over there is being sold by your clients?

Mr. Neblett: Oh, yes.

The Court: Advertised for sale, that is the equipment, and the property, moveable, property, that has been and is being now advertised by your clients for sale; no doubt about that, is there?

Mr. Neblett: None whatever.

The Court: Your claim is that you have a perfect right to do it under this arrangement here, number one, because this plant has never been designated under that Act of July 2, 1948, and therefore, not having been designated there is no public [56] policy involved in preventing your doing it?

Mr. Neblett: That's right.

The Court: Number two, no provisions in the conditions, and under these conditions you have an absolute title to the property and therefore these contentions are void on the ground they are in the restraint of alienation, and number three, that the clause depended upon themselves don't say when during the ten years you have to replace this equipment if you sell it, and certainly it wasn't intended that you should hold it all that period of time, because it would become obsolete, already obsolete, and furthermore, that said division three of the quit claim deed says you wouldn't remove anything which would reduce the capacity of the plant to produce the items for which it was designed, and half of the plant is already gone and the other half left, and it was designed primarily as a ship build-

ing plant altogether, and no ship building is going on there now, no ways, or anything else.

Mr. Neblett: That is right, your Honor.

The Court: And fourth, that this being an action, a breach of a contract, it is an action at law, not of equity, and therefore no injunction can be issued.

Mr. Neblett: Those are all the points I have made up to this moment; yes, sir.

Now, there is one other point that arises out of the chattel mortgage. The chattel mortgage is not attached to the [57] Complaint, but it is referred to in the Complaint and in the affidavits. That is an ordinary chattel mortgage form, not quite exactly like a California general form of chattel mortgages which your Honor is so familiar, but it is almost entirely in the same form, and I will have to repeat myself a little now, this chattel mortgage was executed and delivered at the same time that the bill of sale was executed and delivered; the whole transaction was consummated in one movement and at the same time.

Paragraph Three: "The mortgagee agrees to release all the chattels from the lien of this chattel mortgage upon the payment by mortgagor to mortgagee the sum of \$366,660, which sum has been established as the fair value of said chattels. The mortgagee will also release a part or any portion of said chattels upon the payment by the mortgagor to mortgagee of the fair value (fair value to be established by mortgagee) of the property to be released. All payments so made shall be applied against the



unpaid balance of the total indebtedness of \$961,200 in the inverse order of maturity, as specified in the terms of the promissory note of even date."

Now, the Government drew all these instruments itself, well known, no question about that.

The Court: Yes, I know.

Mr. Neblett: They drew them.

The Court: The one that drew it is to be interpreted [58] against, I know that.

Mr. Neblett: Now, Paragraph 9 of this chattel mortgage says this:

"Said mortgagor does hereby state, declare and warrant that it is the sole and separate owner of all the within mentioned chattels and that there are no liens or encumbrances or adverse claims of any kind whatever on the same or any part thereof."

Now, evidently the Government didn't think it had very much and required this to put this in the chattel mortgage warranting that we owned complete title to it, and the sales which have been made have all been released by the Department of the Government to whom it is assigned. The General Services Administration signed partial releases for all this equipment and the price has been paid.

If your Honor, at this moment, if your Honor is going to declare the afternoon recess, I think I can dig up that personal property case while at recess.

The Court: I can do that, if you can find it. I will declare a recess.

Mr. Neblett: I will see if I can find it.

The Court: For ten minutes. There is another point about this that strikes me—if I should grant this injunction—you might be thinking of this, par-

ticularly Mr. Peckham—if I should grant, refuse to grant this injunction and they continue [59] with the sales, since apparently there is no showing that they are not a very solvent concern, where would the irreparable injury be?

Now, I can anticipate your reply would be, well, the national emergency might occur and we would be just holding the bag. The answer seems apparently to be, well, this was never really intended, the policy, this particular plant was never designated after that, after July 2, 1948, as one of the security plants, and therefore it wouldn't be, that policy wouldn't be violated, couldn't be at any time.

You understand the point I am trying to express?

Mr. Peckham: I think I do, your Honor. I agree with your Honor that it is not a question of, for purposes of this hearing, though there may be some question, it is not a question of financial responsibility as if this were an action outside of the National Industrial Reserve Act. Of course, we don't agree with the contention of Counsel that this has not been properly designated so that we ought to begin from the premise that it was properly designated.

The Court: We will take a recess for ten minutes, and you can find that case.

(A short recess.) [60]

The Court: Did you find anything, counsel?

Mr. Neblett: I found something which I think answers the question. Certainly a good lead on it. It is the case of Ponsonby against Sacramento

Suburban Fruit Lands Company and it is in 210 Cal. 229. It arose under the Attachments Caption of the Code of Civil Procedure, Section 537 and sub-divisions of that Section, and the question presented was whether or not certain things were property within the meaning of the attachments sections, and the court said at page 232, "The question first presented is whether when a plaintiff has suffered damage by the fraudulent representations of a non-resident defendant, has he suffered an 'injury to property' within the meaning of subdivision 3 of Section 537 of the Code of Civil Procedure above quoted?"

Then the court says: "The answer to that question hinges on the proper interpretation of the term 'property' as therein used. The term is a generic one, and its meaning in any case must be determined by ascertaining the sense in which it was used. When unqualified the term is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate," citing the case of *Teschmacher vs. Thompson*, 18 Cal. 11, "whether corporeal or incorporeal," citing cases. "In 6 words and phrases, 5693 et seq. (first series) and 3 words and phrases, 1275 [61] et seq. (second series), are to be found many definitions of the term amply supported by authority. The following are typical:

"Property signifies every species of property. It is nomen generalissimum and comprehends all a man's worldly possessions.

"In its proper sense properly includes every-

thing which goes to make up one's wealth or estate.'

"In *King vs. Gotz* at page 240, determined to find as 'including all that is one's own, whether corporeal or incorporeal.'

"We find no reason to believe that the Legislature did not intend to use the word in the above broad and comprehensive sense. There is nothing to qualify the expression either in the Code section in which it was used or in any other related section. We are of the opinion, therefore, that the expression was so used in this statute. It therefore follows that any diminution of a plaintiff's estate by the fraud of another amounts to an 'injury to property' within the meaning of the section. This becomes more apparent if we examine the actual facts of this case, as disclosed by the allegations of the complaint. Before the alleged fraud and deceit were practiced on the Ponsonbys they had a worldly estate consisting of real property in Minnesota of the value of \$5,500. After the fraud had been [62] perpetrated they had a worldly estate of \$1,000 cash and real property in California valued at \$500. The worldly estate of the Ponsonbys had been diminished or injured, to the extent of \$4,000. In such cases the injury consists in the wrongful diminution of the plaintiff's worldly estate."

Of course the word "property" is used in the attachment sections the same as that. That is not the case I had in mind, but I just picked up the first one I found in the short time I had.



The Court: What does that Section 711 say, again?

Mr. Neblett: "Conditions restraining alienation void. Conditions restrain alienation when repugnant to the interest created, are void."

The Court: You say that is under the section which is generally devoted to property—not to real property, but just property?

Mr. Neblett: That comes under Division 2, point 1, title 2, article 2. That is the way it is described in the Code. And it is the same Division and part and title that the section I read your Honor a while ago, Sections 654 and 657. It comes in that general classification. So far as our motion to dismiss is concerned, your Honor, this covers the point which we desired to make on our motion to dismiss.

The Court: All right.

Mr. Neblett: I assume that the Court—naturally in this argument I was very largely limited to the allegations of the complaint. I think I went out of it a little bit, which I think counsel will excuse me for doing because I don't think I went out any further than he did this morning. This will conclude our argument on the motion to dismiss.

Mr. Peckham: Your Honor, I would appreciate your indulgence while I go through the contentions which have been made by counsel in the order in which he brought them up. Although your summary of the contentions, I believe, would be a more neat way of doing it, probably, I have my notes in the order in which they came up.

First of all, counsel in the early part of his argu-



ment referred to the sections of the National Reserve Act of 1948 as the policy of Congress which declared, reading the last sentence, "it is further the intent of the Congress that such government-owned plants and such reserve shall not exceed in number or kind the minimum requirements for immediate use in time of national emergency, and that any such items, which shall be surplus to such requirements shall be disposed of as judiciously as possible." He stressed the minimum requirements aspect and related to your Honor that the plan there is not one that now can be used.

I don't think that counsel can advocate that position. [64] The Act itself sets up the Secretary of Defense to make that determination. It is a determination that will be within the Department of Defense to make. Again, I don't think it would be a proper matter to take evidence on, and I don't think your Honor would want to sit and pass judgment on that matter in regard to whether or not this particular plant would be included in the National Reserve as that term is used in the Act.

The Court: Insofar as any motion to dismiss is concerned, I wouldn't consider it. Insofar as the motion for interlocutory injunction is concerned, it is a consideration to be weighed in determining whether there is going to be any reparable harm to the government in the event that I don't grant the interlocutory injunction, because all they are doing is selling off a lot of machines, tools and equipment which they of course can be required finally to put back there or pay damages for doing

so, and so forth. There is no statement that the damages wouldn't if this action, a simple breach of contract, wouldn't suffice so far as the government is concerned. The question whether or not this is a violation of a policy of the United States which has to do with a national emergency may weigh against the fact that apparently there is no irreparable damage shown except that violation, and Mr. Neblett is arguing that this wouldn't come within that policy by virtue of the fact that they haven't any [65] designation of that.

Mr. Peckham: Go into that point, your Honor—

The Court: On the motion to dismiss, the argument he makes at that point, in that respect, does not seem to be valid and on the motion for interlocutory injunction it does seem to have some bearing.

Mr. Peckham: If you Honor please, on showing on the application and the production of testimony insofar as the government and other evidence as we put on that the plant has been properly designated by the Munitions Board and that they were properly designated by the Secretary of Defense under the Act, and that these provisions are in the bill of sale within the meaning of the National Securities Clause as it is defined in the Act, then your Honor wouldn't expect the government to make a further showing that that determination was correct?

The Court: Oh, no.

Mr. Peckham: Yes.

The Court: That is another agency. I can't interfere with what they determine.

Mr. Peckham: Yes, that is what I had in mind, your Honor. Now, in regard to whether or not this plant has been properly designated counsel, when your Honor was questioning him, did state that the provisions known as the National Securities Clause were being imposed before the National [66] Industrial Reserve Act of 1948 was enacted. That is correct. They were imposed properly under authority given by Public Law 364, known as the National Securities Act of 1947, wherein Section 5A—

The Court: Where is that? Is that in USCA?

Mr. Peckham: 50 USC Appendix 1611 through 1646.

Mr. Neblett: That is the Surplus Property Act, I believe, you have given now, isn't it?

Mr. Peckham: This is the Act of August 5, 1947, Public Law 364, to authorize leases of real or personal property by the War and Navy Departments and for other purposes. I believe that—isn't that the National Securities Act of 1947? Well, let me read Section 5(a):

“Whenever in the opinion of the Secretary of War or Secretary of the Navy, as the case may be, the interests of national defense require assurance of continued availability for war production purposes, of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are author-

ized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability.”

The Court: Now, you said that is Title 5, Sections 1611 to 1646?

Mr. Peckham: Your Honor, I am unfortunately looking at the Statutes at large and I am not sure which USC section that is.

The Court: Give me the volume you are reading from.

Mr. Peckham: 61 Statutes, US Statutes At Large, Volume 61, Part 1, 80th Congress, at pages 774 and 775.

I would also refer your Honor to the National Industrial Reserve Act and just hastily refer to Section 452, Title 50, which has been referred to by counsel.

Now, (a) of that section, “The term ‘National Industrial Reserve,’ as used in this chapter, means that excess industrial property which has been or may hereafter be sold, leased, or otherwise disposed of by the United States, subject to a National Securities Clause, and that excess industrial property of the United States which not having been sold, leased or otherwise disposed of subject to a National Securities Clause, shall be transferred to the Federal Works Agency under Section 454 of this Title.” It is the first part I wanted to stress.

Further: “The term ‘National Securities Clause,’ as used herein, means those terms, conditions, re-



strictions, and reservations, heretofore formulated or as may be formulated under Section 453 (2) of this Title'' for certain restrictions and so forth. [68]

This Act of 1948 simply restated a practice which was already in effect, administratively put into effect, and then later included in the National Securities Act of 1947, then to be, as I said, placed in this Act.

Now, attached to the complaint is the designation of the Moore Dry Dock West Yard. It has also been included in the official report of the Munitions Board to Congress on two different occasions in the years 1949 and 1950. We don't rely—certainly not entirely—on the plant release of John Steelman that Mr. Neblett referred to, but to the letter of P. W. Timberlake to the Deputy Administrator of the War Assets Administration, which is Exhibit 2 of the complaint, which lists in the annexed pages to that matter many plants, one of which is Moore Dry Dock Company, Oakland, California—that is found on page 5 of the annexed list of plants— [69] Oakland, California, W. C.-70588, which is the east yard of that involved, and under these provisions the yard is an agency of the Department of Defense, one of the instrumentalities to which the Secretary of Defense operates. It is a proper agency and has been delegated the authority to make these designations by the Secretary of Defense, Forrestal, pursuant to that citation which I believe I gave your Honor earlier in the Federal Register.



The Court: I remember your mentioning that Federal Register. Which one is that?

Mr. Peckham: Let me see. Just a moment. Well, I can find that for your Honor.

The Court: We won't finish this case today.

Mr. Peckham: It is the Federal Register, October 7, 1948; Federal Register Document Number 48-7,134. I think I have a page citation here somewhere, too.

The Court: In that connection, I don't want to disconcert you in your argument, but one point was made by the other side that this subdivision 3 says that "no bill of sale or disposal of machine tools or other severable production equipment is to be made, the lot of which would materially reduce the capacity of the plant to produce the items for which it was designed."

He says that west side is really the whole plant, as a whole, not just the west side is only a part of it, and since the east side has been split up and the west side is taken off, [70] consequently, this contention cannot be applicable because the plant as a whole was a shipyard. Now, it isn't a shipyard, and doesn't have any ships and no ways or anything else so that this language is really meaningless or inapplicable.

Mr. Peckham: Well, your Honor, I believe that the west side, the west yard has been used for ship repairs. I conferred with representatives of the Bureau of Ships of the Navy, and the yard could still be used for that purpose in case of National Emergency. The west yard was a part of the yard

used for ship repairing or construction of new ships, and that it does have a value and purpose independent of the east yard.

Going to the question of financial responsibility as being a criteria to establish irreparable damage, we have discussed that and I don't see in that, in connection with counsel's contention that this property has neither been depreciated out, that it has no particular value since more than seven years—it so happens, your Honor, and we can establish this by evidence at the hearing, that the machinery and equipment that was conveyed to the Oakland Dock and Warehouse Company at the \$366,000.00 figure, that was a very low figure for the reason of these restrictions. If these restrictions had not been placed in the bill of sale, the Government could have realized many, many, many, many more dollars than they did realize; and the fact is that if the Oakland Dock and Warehouse Company is permitted to go on and sell this property at a large profit, it will [71] be because the restrictions and regulations are not enforced and they are allowed to take advantage of a profit which—of a situation which the Government never intended in the distribution of the surplus properties and disposal of surplus properties.

We can produce evidence to show one piece of machinery, the most recent one, was sold and delivered. The fair value was \$1500.00 and it was sold for \$7,000.00 by Moore Drydock Company. When you apply that kind of a situation to \$366,000.00 worth of personal property, valued at that low

figure because of these very restrictions, and permit defendant to sell that property, much of it very valuable and still difficult to procure, it will perhaps be enough realized to pay off the whole damage just from the amount realized on the sale of the personal property.

The Court: Well, suppose they did that and suppose no claim—and suppose your claim that it would constitute an element of damage to you which you could recover in a proper action, and perhaps in this action? It is an action for breach of contract. You could say you took that low figure because of this restriction and they violated the restriction; therefore, you lost the value of the restriction, which was the difference between what they sold the property for and what you sold it to them for. You see, we are still talking about injunctive relief, not on this motion to dismiss.

You see, there is a difference between two matters. For [72] instance, I might deny the motion to dismiss and still also deny the right for interlocutory injunction. I am not saying I am going to, I am just telling you there is a difference in those subjects we are talking about. One is a motion to dismiss and the other a motion for interlocutory injunction.

We haven't heard any evidence on that or anything.

Of course, the motion for interlocutory injunction involves, as one of the elements, whether or not there will be irreparable injury involved.

Another element is to try to balance the equities,

whether it would be more equitable and more convenient to deny the injunction or whether it would be more equitable and more convenient to grant the injunction.

There are two matters that go to the question of injunction.

But while we are on this subject, if this doesn't disconcert you, let's get back to these claims that go to the motion to dismiss. For instance, that restraint on alienation of these conditions.

Mr. Peckham: May I address myself to that, your Honor? I think that is a fundamental issue.

The Court: Yes.

Mr. Peckham: First of all, and before I get into the question of whether or not that whole section pertains to personal property, or to both personal and real property, we take the position that in the disposition of property where the [73] United States has been an owner and was the seller of that property, that nowhere—that no State law applies just because the property happened to be situated in California, and just because the purchaser of the property happened to be a resident of California.

It is, further, in the power of the Federal Government to dispose of and make all rules and regulations respecting the territory or other property belonging to the United States. That is found in Article 4, Section 3, of the Constitution, which is, of course, the Supreme Law of the Land.

In *United States against Jones* decided in this Circuit——

The Court: Is this in your brief?



Mr. Peckham: No, it isn't, your Honor.

In *United States versus Jones*, 176 Federal Second, 278, that was a case arising out of the surplus property administration. Property was sold with proper bill of sale, and the question arose as to whether the law of the State of Oregon applied and Judge Yankowitz, sitting on the Ninth Circuit, gave very little attention to that contention, and stated that where the Federal Government is disposing of property, it can put what conditions and restrictions and reservations on that sale that it desires by its regulations and laws, and that no State law—that any State law does not apply to such a transaction between the United States and individuals; that the United States, under this Constitutional provision, is able to set down [74] those rules.

One of the major cases, a Supreme Court case, *United States versus the County of Alleghany*, 322 U. S. 174, the Court held that the question as to the owner's title in the property vested under Government Contract is not determined by the law of the State where the property is located and said further,

“The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts to which the United States is exercising its Constitutional functions, their consequences on the rights and obligations of the



parties, the titles or liens which they create or permit, all present questions of Federal Law not controlled by the law of any State.”

In this matter where the United States is the party which is transferring property, the Federal Law applies and the State Law does not. There are cases, and counsel cited one of them, which is that case of Los Angeles Railroad Company versus the United States where the Government is the transferee of the property, the property being conveyed to the Government. In those cases, it has been held the State Law does apply because the Government can only acquire as good a title as a person has who conveyed to it. [75]

However, when the Government is conveying the property, the State Law does not apply and the Federal Law applies as to that.

The Court: What is the Federal Law of restraint of alienation?

Mr. Peckham: I think it would depend on the Statute that is applicable to a particular situation. Here we have the National Security Act of 1947 and the National Industrial Reserve Act of 1948, and further, the surplus Property Act which named the administrator—which has a thoroughly blanket provision that the administrator can impose such conditions as necessary to carry out the intent of the Act and related acts pertaining to surplus property.

The Court: What I was wondering was whether or not some of those acts impose any restriction—whether some of those acts say they can impose any restrictions they want—the United States can. Sup-

pose there was an unknown principle of law prevailing all over the United States, in every State, and this is a general legal principle to the effect that you couldn't in any conveyance restrict, make a condition which restricted the alienation of property?

Suppose that was the general principle of equity and for real property or personal, would or would not the United States be bound by that?

In other words, you say that you are given the right to [76] impose those conditions and you have that right no matter what the general law is under subject?

Mr. Peckham: That is right. In other words, even though there was a general law to be applied, I would say where specific acts of Congress are made, that relate to the United States, that such acts, that those acts, of course, would apply in situations arising under that act, and certainly this is one of those situations.

Now, counsel has stated that there is no provision in the bill of sale that the Government can take over, and expressed the vagueness of the Ten Year so-called dormant stages. Section 6, for instance, of the bill of sale, which is annexed to the complaint, on page two; states:

“When, in the opinion of the appropriate Secretary, the vendee fails to comply with the oppositions described herein, the vendor shall have the right to take full possession of said machinery, machine tools and equipment and to

take such action as may be necessary to remedy the vendees' default."

It also provides for the activation in considerable detail and restricts the—sets time for notice of 120 days, during which time the vendee has to prepare the plant to be turned over by the Government, and also states it can only be taken over, well, a ten year period, but it does spell out those restrictions which have been placed in this bill of sale. [77]

In relation to the—this is coming back to the point your Honor asked about—in relation to the Code Sections it is clear injunction cannot be given to prevent breach of contract in the Federal Court but by the equity rules of the State Courts, and I would like to cite cases on that. *Mississippi Mills versus Cohen*, 150 U.S. 202; *Duffey versus Smith*, 237 U.S. 101; *Pussy and Jones versus Hensen*, 261 U.S. 491. Those were cases arising between individuals, between private parties wherein the Court speaks in essence that Federal law applies as far as the principles of equity are concerned, even though it might be different from——

The Court: Are the State and Federal laws different in that respect?

Mr. Peckham: Yes.

The Court: In other words, isn't it a general principle of law the act of breach of contract, that that is on the common law side of any court and that accordingly no injunction can be granted? As a matter of fact, your injunctive relief is really an

equitable relief and it springs basically from the old equitable principle that equity will interfere where one of the parties hasn't a plain, adequate and speedy remedy at law, and if you sued for damages, you are really suing on the law side. Just like, take the case of breach of contract, a person has two different remedies. A person has the remedy of breach or rescinding of contract and sues on the equity side for rescission or cancellation of the contract and incidental damages. Here [78] they make the point that this is an action for damages on the law side, and they refer under that rule that any property, Federal or State, that there is no right to injunctive relief.

Mr. Peckham: Your Honor, I would like to go on on that point. In fact, I think perhaps mentioning this action as an action for equitable relief because there has been a breach of contract, that is not actually present in the situation. Actually, it isn't breach of contract that forces the Government to come in and sue for equitable relief in itself. I am confusing two thoughts. It isn't that we have a right to damages that is here important. If it is just a question of the financial responsibility, we have a right to action for damages then the whole policy that underlies the National Security Clause would be unnecessary because originally surplus plants could have been disposed of at the restricted price and release the Government would have obtained, or now if this injunctive relief is not granted the Government will obtain in this action by suing for damages. They would have originally got what

the Government was entitled to for these plants without any restrictions if it were to be conveyed in that way.

The policy on the Act, the legislative policy which Congress set down, which has been carried out by the Secretary of Defense through the Munitions Board, is what is in jeopardy here. If it can be established that proper designation has been made and this is part of the National Reserve, the [79] dismantling, the cannibalization of this plant will certainly be a violation of the legislative policy laid down. I think in view of the policy laid down by Congress these surplus plants are to be held and not dismantled. I mean to permit it to go on without injunctive relief certainly will cause the Government irreparable damage because the plant won't be ready in case of a national emergency.

Regarding the rights of the Government to have an injunction to enforce the rights, property rights, and also the laws in this situation, I would call attention to U.S. versus City and County of San Francisco, 310 U.S. page 16. Your Honor may recall that case as one that arose out of the Raker Act where the P.G.&E. was being given the power to resell to consumers whereas the Raker Act—in that case the point came up that it wasn't a proper case. It was a breach of contract, was not a proper case for injunction to have been issued. And Justice Black in that case didn't accept that condition. He said the United States has a perfect right to enforce its laws and a perfect right in such a situation as that, which I think is analogous to this case.



Counsel also stated that the fact that the general administration has released the Federal mortgage from time to time could be considered a release of its property to be disposed of as the defendant saw fit. We contend, of course, that the conditions of the chattel mortgage that release of the [80] chattel mortgage were restricted to the—that is, that the release was restricted certainly to a release of the chattel mortgage, not to a release of the National Security Clause. It was certainly, however, even though you are required to keep this property, to have a chattel mortgage release for you wouldn't have to pay interest. The fact that the chattel mortgage is released, there is nothing in the provision of the chattel mortgage to provide a return to the National Security Clause or—I think the chattel mortgage release is simply a release of the property to release that particular equipment. In regard to the declaration by the mortgage, Paragraph 9 in the chattel mortgage, that the mortgagor is the sole owner of the property, that would seem to be a self-serving declaration found there on the part of the mortgagor. The mortgagor——

The Court: Well, that doesn't impress me very much, anyway.

Mr. Peckham: Yes. It was standard.

The Court: It has reached 4:00 o'clock, Mr. Peckham.

Mr. R. L. Miller: Your Honor, may I, before we adjourn, request permission to address the Court in this case? My name is Miller, R. L. Miller. I am attorney for the Moore Dry Dock Company. The

Moore Dry Dock Company is not a party in this case, but they are indirectly and may be directly affected by it. I may not be able to be here at the continuance of this matter, and I would like to say this: [81]

First, during the course of the hearing today there has been a good deal of reference to the Moore Dry Dock Company west yard and the Moore Dry Dock Company east yard. I wanted to be sure that there is no misunderstanding and Moore Dry Dock Company, a private corporation, to have owned that west yard. That just happened to be a name applied to it because during the war they operated it for the Government. That west yard belongs to the United States Government. The Moore Dry Dock Company's east yard was never involved in this because that yard was owned before the war, during the war and now by the Moore Dry Dock Company; and when you speak of the east part or east yard here, they have reference to the east half of the west yard and not Moore's east yard. I think for the purpose of the record that should appear.

Moore Dry Dock Company has for a number of months been buying equipment from the Oakland Dock and Warehouse Company, some of the equipment referred to in this hearing, and that equipment was advertised for sale publicly, Moore came and inspected it and found pieces of machinery he needed in their yard; he bought it, paid cash for it, took it to their east yard, their own yard, installed it there and used it. I wanted to be sure that it is understood here that my client, Moore, bought that

equipment with no knowledge, actual or constructive, of any restriction upon its title. They came and purchased it and the chattel mortgage had no reference whatsoever to any [82] National Security Clause. They knew that there was a principals' release clause in that chattel mortgage. The items they bought were released from the chattel mortgage by principals' releases signed by a representative of the United States Government and placed on record.

The Court: Was there any release against Moore Dry Dock?

Mr. Miller: No, but I want to be sure no order is entered that would in any way cast any cloud of doubt upon the title to that property.

The Court: That you bought?

Mr. Miller: The property that they bought. They are not interested here in the injunction so long as it doesn't affect the property already transferred. That concludes my statement. We are not parties to this cause, but I wanted that entered.

The Court: You are certainly not interested in the application for interlocutory decree?

Mr. Miller: Not at all.

The Court: If I were to protect my rights, if this case goes to trial on that permanent injunction, if you had filed an Intervention so that what you have already bought without knowledge, bona fide purchase for value here, that were protected——

Mr. Miller: Certainly. That is the reason for my appearance here today. I don't think there is any need of staying longer on this motion to dismiss

because I don't see [83] where we can be affected at all.

The Court: In any event, as I said, I have been here all day long so I will have to continue it. Monday we can't possibly take it up because we have the law and motion, Counsel. I can go ahead with it on Tuesday, I think.

Mr. Neblett: That is agreeable to us, your Honor, the defendant.

The Court: And by that time I can listen to further arguments on the motion to dismiss and then if I decide against the motion we can proceed to present whatever evidence is necessary to be put in on the preliminary injunction matter, in other words, on the application for temporary injunction.

Mr. Peckham: Well, your Honor, would your Honor desire further written brief and points and authorities submitted? Those submitted by the Plaintiff I know were hastily drawn because of the immediate necessity to take action, and if your Honor feels that it would be desirable to present written argument, and so that Counsel also could answer some of the contentions we have hit upon today, I would be glad to do that. I know that this perhaps becomes a trite saying around here, but I do know the Government is quite concerned about this case and I would feel I were remiss in my duty if I didn't furnish everything the Court felt necessary.

The Court: I have taken down the citations and taken down the points both sides have made, and I will look them up [84] in the meantime and may be

in a position to rule on the motion to dismiss on Tuesday, then you may proceed with your injunctive relief if I should decide the motion to dismiss against the defendant.

Mr. Neblett: If your Honor please, the defendant is getting a daily transcript and if the Court would like to have a copy of the transcript of the citations and arguments made today we will get one available for you.

The Court: I wonder if you could have that available? I would like one Monday morning.

Mr. Neblett: The Reporter promised to furnish mine tomorrow afternoon, and if the Court—I suppose the Reporter would send one to the Court wherever the Court is tomorrow afternoon—or Monday morning, did you say?

The Court: Monday morning, yes.

Mr. Neblett: Mr. Reporter, you can have the copy for the Court by Monday morning?

The Reporter: Surely.

The Court: Are you getting a copy also?

Mr. Peckham: I think I had better, yes.

The Court: I don't think it is necessary for you to submit any authorities that you haven't already submitted unless if you feel you want to you can give me a written memorandum and set them down and send Mr. Neblett a copy.

Mr. Peckham: Certainly.

The Court: Where are you now?

Mr. Neblett: At the Palace Hotel.

The Court: Well, we will continue this to Tuesday morning at 10:30.



The Clerk: All witnesses subpoenaed in this case are requested to return to this courtroom at 10:30 a.m. Tuesday morning, June 20th.

Mr. Peckham: I was just going to mention the temporary restraining order expired at noon today, and I wonder if——

The Court: I will make an order continuing it in effect. It will be continued in effect pending this hearing. Court will adjourn. [86]

Tuesday, June 20, 1950, 11:00 o'Clock, A.M.

The Clerk: U. S. versus Oakland Dock and Warehouse Company, Order to show Cause, further hearing.

The Court: I might say this to you, gentlemen, that I haven't had time to digest all these authorities and I would like to just hold the motion to dismiss in abeyance and have you proceed on the—if you have any proof to offer in connection with the application for temporary injunction, or against it, why, offer that now. You have pretty thoroughly argued the situation already, so if you want anything to add to the record, just do that, and I will take it under advisement.

Mr. Neblett: There are a few authorities I would like to advance to the Court in respect to those that Mr. Peckham, that the Counsel for the Government entered the other day against the motion for dismissal, if that will be satisfactory to the Court.

The Court: That will be all right. You can proceed to do that.

Mr. Neblett: Very well, your Honor. Your

Honor, I don't intend to read from all those books; I just have them handy in case I need them.

The first authority to which I wish to reply is that cited for Counsel for the Government, the United States against Jones, 176 Federal 2d, page 278. That is a case in which Judge Yankwich, sitting on the Circuit Court of Appeals, rendered an opinion relating to certain properties sold by War Assets Administration. The Government brought a suit in that case to set aside a sale made by War Assets Administration upon the ground of fraud. The demurrer was sustained to the complaint, or motion to dismiss was made, I have forgotten which. The United States appealed it to the Circuit Court of Appeals and the lower court's decision was affirmed.

There is some language in there, general language, relating to sales by the Government which we have no quarrel with. I think that case is in favor of the defendant here. Certainly I don't believe it is in point, because the Court found the lower court, made in its opinion, examined by the Circuit Court of Appeals, said neither fraud nor subtlety on the part of the agents of the War Assets Administration was charged; and then went on, was that a lack of legal authority to make the conveyance.

The only point involved was the question of whether there was authority to make the legal—legal authority to make the conveyance. No question about that. That is given in Section 1652

USCA, the old War Assets, the old Surplus Property Act.

I can't see, your Honor, where that case is at all involved.

Now, the next case upon which Counsel relied was United States against the City and County of San Francisco, 310 U. S. [88] at page 16.

The Court: That is under the Raker Act.

Mr. Neblett: That is it, your Honor. This case—I read it rather hurriedly, but in general what was involved there was that under the Raker Act the Hetch Hetchy dam was built in the Forest Reserve, and the Act provided that power could not be sold to individuals, power was sold by the Hetch Hetchy Dam Authority to the Spring Valley Water Company, and it in turn sold the power to the citizens of San Francisco. That case arose on a situation entirely different from ours. The Act provides, Section 6: "That the grantee," the City, I think there was a special Act, I'm not sure about that—

"That the grantee is prohibited from ever selling or letting to any individual except a municipality or municipal water district or ir-water or electric energy sold or given to it or rigation district the right to sell or sublet the him by the grantee." That was in the deed.

"Provided that the rights hereby granted shall not be sold, assigned or transferred to any private person, corporation or association."

And in the case of any attempt to sell, assign, transfer or convey this grant shall revert to the Government of the United States.

There is no reverter in the bill of sale or in the deed, [89] for that matter. That involves an entirely different situation upon a deed or bill of sale. There is a reverter if there is a condition broken; no reverter here. If a condition were broken and it were valid, then nothing could happen because there is nowhere for the property to go. It has to stay in the vendee.

And the question of designation, I mean of delegation of authority, I think those cases which we have already cited cover that very thoroughly, but I do not believe I cited to the Court in argument, in fact I know I did not, the two cases of Morgan against the United States. The first of those cases is reported at 298 U. S. page 468; the second of those cases is reported in 304 U. S. at page 1.

It is very probable that the Court remembers those cases. There it was a question of whether or not the Secretary of Agriculture could delegate to his subordinates the right to fix rates for the Kansas City stock yards. They are known as the Kansas City Stock Yard cases. It was held in those cases that the Secretary of the Interior could not delegate that right.

Again repeating myself, that if this authority had been delegated to a deputy of the Secretary of Defense to establish whether or not this property was a part of the Industrial Reserve and to fix the Security Clause for disposition, and at the same time to designate it for disposal subject to that [90] Security Clause, if the deputy had done that, that



would probably have been good, or certainly under the California law it would have been good.

The next case or question of delegation which I think is important is Cudahy Packing Company of Louisiana against Thomas W. Holland, administrator of the Wage and Hour Division of the United States Department of Labor. That case is reported at 315 U. S. page 357. It was held in that case—I am reading from the syllabus now:

“The power of the Administrator, under the Fair Labor Standards Act to delegate his power to sign and issue subpoenas is not to be inferred, either from the extensive nature of his duties, or from the fact that, under Section 11 of the Act, he is empowered, through designated representatives, to gather data and make investigations authorized by the Act.”

“Unlimited authority of an administrative officer to delegate to subordinates his power to issue subpoenas is not to be lightly inferred where, under the applicable statute, this power is in terms granted only to him.” “The fact that individual members of the Federal Trade Commission are authorized to sign and issue subpoenas does not empower the Administrator, under the provision of the Fair Labor Standards Act giving him all the powers with respect to subpoenas that are conferred upon the [91] Federal Trades Commission, to delegate to regional directors the authority to sign and issue subpoenas, since the Administrator



himself, not such directors, stands in the position of the individual commissioners.”

So we say that this authority could not be delegated.

The Court: Of course, there was no delegation under the Act of July 2, 1948, was there?

Mr. Neblett: Yes, your Honor, the delegation came July 3, 1948.

The Court: There was no designation, I should say, of this property.

Mr. Neblett: No sir, there has never been.

The Court: Under that Act.

Mr. Neblett: That is correct.

The Court: The only point here, was there any designation under the previous Act of 1947 and the others Mr. Peckham referred to?

Mr. Neblett: The previous Act, 364, I don't have the Act before me, but my recollection is that under that Act there was no provision in that for delegation. I know of no provision imposing the power specifically upon the Secretary of Defense. I don't have that with me and I don't know where it is reported in the books, but if your Honor please, we make the point which I feel very confident of that under—that the purposes of this Act of 1948, which became effective July 2, 1948, was to [92] place the entire Industrial Reserve under the Secretary of Defense and totally away from the three departments under him, namely, the Army, Navy and Air.

The terms of the Act are very specific on that point and while this Act does not in expressed terms

repeal 364 of the 80th Congress, First Session of the 80th Congress, it does establish the Industrial Reserve as a new thing. Everything that went before that is unimportant. This Act became effective, the Industrial Reserve Act of 1948, July 2, 1948, and this property was purchased eleven months later from the Government.

The Court: I understand that.

Mr. Neblett: Now, here is the thing that I want to make as clear as I possibly can about the bill of sale. I will have to look in my files to find the reference, I can't find it there.

If your Honor please, if the Court would refer to the bill of sale in the Complaint at this time I think I can shorten my argument on this. The bill of sale is attached to the Complaint as Exhibit 1.

The Court: I have it.

Mr. Neblett: Now, your Honor will note that the bill of sale says that: "Said chattels were duly declared surplus and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and W.A.A. Regulation No. 1 as amended." [93]

Executive Order No. 9689 has to do solely with surplus property, nothing to do with the Industrial Reserve. And the War Assets Regulation No. 1, of course, has the same thing. Up in the body of the—up in the beginning of the bill of sale, "The United States of America, acting by and through War Assets Administration under and pursuant to Reorganization Plan of 1947 and the powers and authority contained in the provision of the Surplus

Property Act of 1944," does convey, and so forth.

This Security Clause and this bill of sale was not the Security Clause that was in force at that time, showing this property had never been designated for disposal.

We go back now to the Public Law 883. It says: "To effectuate the policy set forth in Section 2 of this Act the Secretary of Defense is hereby authorized and directed to

"(1) determine which excess industrial properties should become a part of the Industrial Reserve under the provisions of this Act; and

"(4) designate what excess industrial property should be disposed of subject to the provisions of the National Security Clause."

We go back to the report which has been read from here by Counsel for the Government. The report of April 1, 1949, to Congress. We find the security clause, which was supposed to go in this bill of sale, if the property were conveyed [94] according to Public Law 883 and had been so designated by the Secretary of Defense to be disposed of subject to Public Law 883. This security clause became a security clause April 1, 1949; this property was conveyed or sold to the Oakland Dock and Warehouse Company and the bill of sale is dated June 1, 1949, three months—two months later. We are bound by the terms of this deed—this bill of sale, I should say, that is definitely decided in Los Angeles and

Salt Lake Railway Company against the United States, Circuit Court of Appeals, 9th Circuit, 140 Federal 2d 436.

There it was definitely decided in the case brought against the Government of the United States that we are limited to the four corners of the deed and that in effect the rule is the same with regard to the United States as it is with respect to a private person. And that is definitely held when the transaction is an ordinary commercial transaction in some of the cases I have cited on the motion to dismiss, but I come to that a little later.

Your Honor please, to show you just that this security clause is not as ever designated by the Act—let me refer the Court to page 275 of the Report to Congress, by the Munitions Board acting by and on behalf of the Secretary of Defense so stated in the Letter to the Vice-president, President of the Senate. This is dated April 1, 1949, and it says on page 275:

“This part deals with the formulation of the National [95] “Security Clause, and procedures for modification of its provisions for purposes of specific transactions.”

Now, this is a specific commercial transaction in which the Government was engaged in selling us property, to the Oakland Dock and Warehouse Company.

“The National Security Clause is hereby formulated as follows:”

Now, I assume that this is what the Secretary of Defense formulated, because in this letter of March 17, 1949, transmitting this report to the President of the Senate, at the end of that report it is said:

“This report is submitted on behalf of the Munitions Board and on behalf and by the direction of the Secretary of Defense.”

Now, that is a proper designation signed by the Chairman of the Munitions Board. There is nothing else in this thing signed by the Chairman of the Munitions Board.

I hope your Honor will not consider lightly when I say everything that goes before July 2, 1948, is of no force and effect with respect to this property. 1949, I should say—the wrong dates.

“The National Security Clause shall consist of those provisions.”

and so forth. And it is very long and quite different from the one we have in the bill of sale. It is entirely different. [96] Now, it goes on and then says, the Security Clause comes to the point where deeds of real estate, including rights in real property shall be in a certain form. Then it comes to:

“Bills of sale of personal property. (1) Reference to Public Law 883. A property hereby transferred constitutes a part of the National Industrial Reserve under Public Law 883 (80th Congress) and has been designated for disposal subject to the provisions of the National Security Clause pursuant to Section Four (4) thereof. This and the following pro-



visions constitute the National Security Clause of this bill of sale.”

Now, this deed doesn't make any—bill of sale doesn't say anything of the kind. It said:

“Said chattels were duly declared surplus”—which is, of course true—“and assigned to the War Assets Administration for disposal, acting pursuant to Executive Order 9689 and W.A.A. Regulation No. 1 as amended.”

The Government had a right to convey the property to the Oakland Dock and Warehouse Company on terms different from what is required here as property disposed of subject to the National Security Clause, because this document says, in the opening paragraph.

Let us go on: “The bill of sale shall be signed by both parties and shall include the additional provisions set forth below.” [97]

It is not signed by both parties; it is only signed by one. Why did the Government want it signed? Because the Government wanted it signed so that it would become a contract outside of any consideration of whether or not it was—whether or not the rule in 711 of the Civil Code applied.

Now, another requirement: “It shall make specific reference to the agreement of sale or letter of intent.” It doesn't do it. We had a letter of intention in this case. It isn't alleged in the Complaint, but we did have one and I will have it for introduction if it ever becomes important. That is

the reference to the letter of intent or agreement of sale. The only reference is that they were duly declared surplus and disposed of, to be disposed of by the War Assets Administration. The rest of the provisions in the formal security clause provided in 1949, before we bought this property—there are a great number of them here which can be picked out, but these are absolute flat requirements and none of them are in the bill of sale.

Now, the great question of public policy which we have brought up so much—I say “we.” I mean Counsel for the Government has adverted to that quite often. The public policy as established by Public Law 883 hasn’t been applied to this property at all. But here is the reason why this deed, this bill of sale was made in the form in which it was made. I now refer to the Report as of April 1, 1950. Your Honor will [98] recall Section 12, Public Law 883 required the Secretary of Defense to make report each year to Congress. This is the one of April 1, 1950. As of April first. It is dated March 14. And in the letter transmitting this report to the President of the Senate—there is one, also, transmitting another copy to the Speaker of the House. This report is—well, I will read the letter:

“I am transmitting herewith second annual report to Congress of the National Industrial Reserve Committee, Section 12 of the National Industrial Reserve Act of 1948, Public Law 883 of Congress. This report was supported by the Munitions Board, which changed it a little bit. The Chairman of the Board, Munitions Board,

on behalf of and by direction of the Secretary of Defense. Sincerely yours, Hubert E. Howard, Chairman."

This shows that the Government was very anxious to get rid of this shipyard. What I am going to show to your Honor now, it had a lemon on its hands. It was rusting away over there and had already depreciated beyond the point of even seven years. It was actually nine years old. No, just seven years old when the Company bought it. In this report of the shipyard facilities there it is obvious that the defendant wouldn't buy it on these binding terms. It is obvious from the deed that—it is obvious that the defendant from the allegations of the Complaint, in the bill of sale, that [99] the defendant wouldn't take it on those terms. Therefore, the deed was re-formed and put in—the bill of sale was re-formed. I keep referring to deed. The deed is not involved yet. I hope your Honor will pardon me for the slip of the tongue.

The bill of sale was written and the Government is responsible for it and we are bound under it under that Los Angeles Salt Lake Railroad Company case. It is a valid clause, and so is the Government.

This tells the story why the Government was willing to sell this shipyard on a different basis than the security clause, which is rather tough. On page 77 of this Report of 1950 the Secretary of Defense has this to say about shipyards:

"A. Types of Shipyards. The facilities as-

signed this Committee range from independent manufacturing plants for marine engine or marine equipment through facilities integrated with previously established manufacturers to complete shipyards with building ways, outfitting docks, and the necessary shop buildings for new work or repairs.

“B. Manufacturing Plants. With a few exceptions, the manufacturing plants have been served under some form of the Security Clause and are therefore available to the Government in the event of an emergency, with comparatively little delay.”

Your Honor will notice that word there, “some form of the Security Clause.” It means that they may vary in specific [100] instances.

“C. Shipyards. The shipyards, or ship building and ship repair facilities, present a different problem. In view of the fact that there is insufficient ship building and ship repair activity at present to support long established shipyards, together with their skilled personnel who would be essential in any future emergency, it is obviously impossible to maintain the reserve ship yards as active ship building facilities. Conversion to other peace time use is difficult in that the properties generally involve a considerable amount of real estate, a large number of buildings, many of a temporary nature and ill adapted to industrial use, and ship building ways which can serve no

other purpose but are extremely difficult to maintain.”

Interpolating, we know—I mean it is common knowledge that the big Naval yards at Hunters Point and Mare Island are doing very little business. It is common knowledge that, how many they threw off there the other day I don’t know, but there are hundreds of them tied up at Swan Bay, ships of the type built in this yard. Here it says it is obviously impossible “to maintain the reserve ship yards as active ship building facilities, etc.”

“D. Retention of Ship Yard Sites. Recognizing these problems in connection with shipyards, most of the [101] plants have been cannibalized of production equipment, and the land, docks and more adaptable buildings have been leased to a number of tenants for a wide variety of peace time activities. This at least provides for a certain degree of maintenance and some offset of expense to the Government. A suitable modification of the Security Clause provides for the recapture of the sites in the event of an emergency.”

Your Honor please, may I impress on the Court the word “site”? I am not interested in the machinery. The Government isn’t interested in it and the Secretary of Defense and the Munitions Board are not at all interested in the machinery. They are interested only in the site, and there is no argument here but that the Government has now a valid Security Clause for the recapture of the site in the



event of an emergency. They have no interest in this obsolete machinery. That is the reason the bill of sale was written as it is, and this suitable modification of the Security Clause was already on the books April 1, 1949, when the Government sold this property to Oakland Dock and Warehouse Company in 1949.

“Unwarranted expense would be involved in the idle maintenance of ship yards, particularly in view of the fact that practically all were specifically designed for the production of definite types of ships required in World War II. Assuming that there might be quite different requirements in a future emergency, considerable alteration in both layout and facilities may be required,”

end of quote. We are coming back to that.

He is saying “unwarranted expense.” Unwarranted expense on whom? On the purchaser of this property to try to maintain them as shipyards and try to keep that obsolete machinery there so that the Government assumed, the Secretary of Defense assumes there might be, that different requirements for ships that will be built in the future.

Finally, concluding this subject and quoting again:

“With a suitable waterfront site available, at least one of the major delays in establishing a ship building facility will be eliminated by retention of title or lease, regardless of the disposition of buildings and equipment.”

That is the public policy of the United States as reported by Public Law 883, as administered by the Secretary of Defense, including the Munitions Boards. That is the reason I say this suit—this suit was instituted by the Navy. The Navy has no business in court. It has to be done by the Secretary of Defense. The Navy has no business bringing this suit.

Now, if your Honor please, we come down to this. What do we have? We have here under the ordinary law wherein, Paragraph 3, covenant against resale is invalid. If it is invalid, there is no case here of any kind. I am not going [103] over the California cases any more on that because your Honor has been familiar with them for as many years as I have, and I think that is probably stretching it a little bit, but—

I want now to direct your Honor's attention to a case here of the Supreme Court, what it says about covenants against resale and restrictions of alienation of personal property. This answers that question that your Honor brought up the other day wherein these things apply to personal property.

The opinion in this case was written by Mr. Justice Charles Hughes, the name of the case is: Dr. Miles Medical Company against John D. Park and Sons Company, 220 U. S. 373; 55 Law Edition 502. That is a very long case, but I will quote—I will come to one of the points which answers every question that we have been asked relating to personal property and the restraints on its alienation and other conditions.

Before I read it I will refer the Court to 17 Corpus Juris Secundum, page 635, Section 253.

Coming back to this case, the second point made in this case was restrictions, and so forth, on sale of personal property:

“We come then to the second question,—whether the Complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture. [104]

“The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety——”

There are two points involved. The only two points that are involved are what I am now trying to present to the Court——

“The propriety of the complaint is thought to be derived from the liberty of the producer.

“But because the manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose on purchasers every sort of restriction. Thus, general restraint upon alienation is ordinarily invalid. ‘The right of alienation is one of the essential incidents of a right of general property in moveables, and restraints upon alienations have been generally regarded as obnoxious to public policy, which is best served by great

freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.' 'If a man' says Lord Coke in 2 Coke on Littleton, Section 360, 'be possessed of a horse or of any other chattel, real or personal, and give or sell his whole interest or [105] property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest or property is out of him, so as he has no possibility of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man.'

"Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchaser, fix prices for future sales,"

and so on.

That one answers the point exactly. And, your Honor, this closes my argument.

The Court: It is 12:00 o'clock now. We will take a recess until 2:15.

(Thereupon this cause was adjourned until the hour of 2:15 p.m.) [106]

Tuesday, June 20, 1950, 2:20 o'Clock P.M.

The Clerk: United States versus Oakland Dock and Warehouse Company. Further hearing on order to show cause.

Mr. Peckham: Ready for the Plaintiff.

Mr. Neblett: Ready for the Defendant.

The Court: Is there any evidence now to be introduced on this motion for preliminary injunction?

Mr. Peckham: Yes, your Honor. We propose to introduce evidence through the calling of several witnesses, propose to call Mr. Deede, executive of the War Assets Administration, Admiral Klein of the United States Navy and Mr. Bulotti and Mr. Wille, Moore Dry Dock Company, to establish several points I think are necessary for us to establish in this hearing.

The Court: I understand it is admitted now that the defendants have sold and are planning to sell this material?

Mr. Peckham: That is correct.

The Court: What other point is essential—like to hear from Mr. Bulotti—but on the other hand I don't need——

Mr. Peckham: Your Honor, we felt in view of the discussion last Thursday or Friday that it was essential that we establish the—that we introduce evidence to establish the irreparable damage that would occur to the Government in the event that the preliminary injunction was not granted. We desire to show that there are items of machinery and machine tools there that [107] are now difficult



to procure and would be particularly difficult to procure in the event of a national emergency, and we also wanted to establish that this plant had been designated by the Munitions Board at the recommendation of the Navy, as part of an overall plan, that this plant has a particular purpose in this overall plan.

The Court: Go ahead, then.

Mr. Peckham: Mr. Deede.

RALPH G. DEEDE

called as a witness on behalf of the Government being first duly sworn, testified as follows:

The Clerk: Will you state your name to the Court, please?

A. Ralph G. Deede.

Direct Examination

By Mr. Peckham:

Q. Mr. Deede, what is your address?

A. My business address, 1000 Geary Street; home address is 2868 California Street, San Francisco.

Q. You are an official of the War Assets Administration, now the General Services Administration?

A. That is correct.

Q. And what is your position there, Mr. Deede?

A. I am the Director of Property Management and Disposals.

Q. And how long have you been acting in that capacity? A. Since April of 1949.

Q. And did you, in that capacity, have anything

(Testimony of Ralph G. Deede.)

to do with the [108] sale of the west yard to the Oakland Company?      A. Yes, I did.

Q. Now, Mr. Deede, are you familiar with the transaction in this case?      A. Yes.

Q. And you have refreshed your memory from a review of the file of the sale to the Oakland—

A. Yes, sir.

Q. —dry dock yard by the War Assets Administration?      A. That is correct.

Q. Now, Mr. Deede, did you receive any instructions from Washington, D. C., the central office of War Assets Administration, prior to the sale of this yard that this plant was to be disposed of subject to the National Security Clause?

Mr. Neblett: Your Honor please, that is objected to on the ground it is not the best evidence.

The Court: I think the objection is well taken. Any correspondence?

Q. (By Mr. Peckham): Do you have with you the file, Mr. Deede?      A. Yes, sir.

Q. Now, referring to the official records of the War Assets Administration, Regional Office?

A. That's correct. This is rather a voluminous file, rather hard to find some of these documents.

Q. And your records are kept in the course of the official [109] business of the Government of the United States, are they not?

A. That is correct.

Q. And those records are under your custodianship as the Director of the Surplus Property Disposal Unit of the War Assets Administration?

(Testimony of Ralph G. Deede.)

A. I have here a teletype from Washington. It is dated 5/7/48.

The Court: Show it to Counsel.

Q. (By Mr. Peckham): And would you read the telegram?

Mr. Neblett: Your Honor please, we object to the telegram in evidence and object to the witness reading it in evidence. As I understand the law now we are limited to what is in the deed or in the bill of sale and that all this evidence is irrelevant and incompetent and tends to contradict the written instrument.

The Court: It may be, but I will admit it in evidence. May be bearing on the terms of the written instrument, but I am interested in knowing what the circumstances were in this situation.

Mr. Neblett: Your Honor, may I add to the objection that the telegram appears to have been dated May 7, 1948, prior to the time of passage of Public Law 883.

The Court: Yes.

A. This is addressed to the Regional Director, War Assets Administration, San Francisco, and starts as follows:

“Refer to the Administrator’s wire of April 8, 1948, [110] relative to freeze on industrial real property. Munitions Board has requested imposition of National Security Clause on the following additional Industrial facilities in your area.”

(Testimony of Ralph G. Deede.)

And then a list of several facilities, one of which is Moore Dry Dock Company, Oakland, California, MC70588.

“The facilities listed above, together with those facilities shown in the list April 9, 1948, copies of which were sent to you, shall be sold or leased in accordance with applicable National Security restrictions. By direction of the Administrator those facilities not so listed may be offered without restrictions. Those plants on which counter proposals were outstanding on April 8 and were amended to include National Security Clause restrictions and those plants which were awarded between April 8 and today subject to National Security Clause restrictions may be sold or leased without restrictions if not included in the April 9th or the above list. However, in event purchaser or lessee has interposed no objections to National Security Clause provisions such restriction should be included in order to increase industrial potential in event of a National Emergency.

“All cannibalization authorizations applicable to plants listed above are hereby rescinded and inventory of related personal property will be returned to real [111] property accounting. Instructions relative to Jannat and sales of unrelated personal property will be issued by office of general disposal. Signed O.R.P.D.

(Testimony of Ralph G. Deede.)

Office of Real Property Disposal, War Assets Administration, Washington." [111-A]

Q. (By Mr. Peckham): Have you received any further communications prior to the sale of the establishment known as the west yard of the Oakland company from your central office in Washington?

A. Yes, we had considerable correspondence on this yard. And the reason for it was that our office, locally, had made recommendations on several occasions for the western office to appear before the Munitions Board and consult with the Navy to modify the National Security Clause on this plant, and our reasons for doing so were because in our opinion it affected the value tremendously. Of course, we were primarily concerned with getting the most money for the plant and we didn't take into consideration the necessity by the armed forces as to why the plant should be in the Reserve. We were trying to get all the money for it at the time we sold it, and each time our Washington office advised us that the Munitions Board would not agree to the modification of the National Security Clause on this plant, so as a result we offered it subject to the National Security Clause and eventually sold it in that manner.

Q. As an incident to the sale of this plant, Mr. Deede, advertisements were circulated, were they not?

A. Yes, sir.

Q. And notification goes out to potential bidders, does it?



(Testimony of Ralph G. Deede.)

A. That is right. We prepared invitations to bid.

Q. And in your invitation to bid, was there any mention of the [112] National Security Clause?

A. Yes, sir.

Q. And did you take—I believe you have already testified you took part in the negotiations with officers of the Oakland Company?

A. That is correct.

Q. During those negotiations, whom did you confer with regarding the sale to the Oakland?

A. Well, initially it was with Mr. Van Dusen and Mr. Henry Arnold.

Q. Can you identify those two men?

A. Yes.

Q. Who are they?

A. They were officers of the Oakland Dock and Warehouse Company.

Q. And during the course of those conferences, was there any discussion of the sale and delivery of the property being subject to the National Security Clause?      A. Yes.

Q. Now, do you have in your file, Mr. Deede, a Letter of Intent?

A. Yes, sir. Copy of the letter. The original went to the Oakland Dock and Warehouse Company, of course.

Mr. Neblett: I might make a statement. I would object to the admission of this letter because that is not the Letter [113] of Intent. I might say I have sat in on all these negotiations and this Letter

(Testimony of Ralph G. Deede.)

of Intent was supposed to have been signed, but never was. And that Letter of Intent was dated April 27. I have a copy of it which I will make available.

A. I have that one, too. That is in your file?

Mr. Neblett: I think on the record I might say——

A. It is May 27th.

The Court: Was that this year?

A. No, last year; 1949.

Mr. Peckham: I think, your Honor, this might be expeditiously introduced. Counsel informs me he is going to stipulate that that is the signature of Jules—is that Jules?

Mr. Neblett: J. Agostini, Jr., and A. Hanford Morgan. They were President and Secretary of Oakland Dock and Warehouse Company. I am also prepared to stipulate that is the signature of Robert W. Bradford, Regional Director for War Assets.

Mr. Peckham: At this time, Your Honor, I would like to ask the witness to explain the purpose of the Letter of Intent.

The Court: Well, the Letter of Intent may be admitted in evidence on the motion, and just tell me what it says, without reading it.

A. The Letter of Intent, your Honor, was a document which we prepared and had the purchasers of a facility execute, as well as some official in authority at the War Assets, to spell out the terms and conditions of the sale and use it as a document [114] of closing pending the delivery of a deed

(Testimony of Ralph G. Deede.)

so that we could put the purchaser in immediate possession under all the terms and conditions as the plant was sold.

Q. (By Mr. Peckham): Among the terms or conditions, Mr. Deede, was the statement that the property, both real and personal, was sold subject to the National Security Clause?

A. That is right.

Q. Mr. Deede, do you have any personal knowledge as to the original value of the west yard, the western portion of the west yard that was sold to the Oakland Dock and Warehouse Company?

A. Well, our appraisal, which was made by——

Mr. Neblett: Just a moment, if your Honor please. I understand that this is a qualification question. I want to object to his testimony when he gets to the point of establishing the value.

The Court: He is not qualified to state that yet.

A. I have a signed document by the chief of our Appraisal Division with me that established the value of the plant.

The Court: I don't know whether that is admissible, but I will hear it anyway.

Q. (By Mr. Peckham): Will you produce that?

The Court: You mean the value of the personal property?

A. Personal and real, the entire facility.

The Court: We are not interested in the real property.

Mr. Neblett: If your Honor please, I didn't hear what your [115] Honor said the last time. May I

(Testimony of Ralph G. Deede.)

object to the introduction of this document, which is made by another person, and this witness is not qualified himself as an expert. He is relying upon somebody else and it is therefore hearsay.

The Court: That is true. I stated the objection you made that he wasn't qualified was good, but I just wanted to find out what the Government value was.

Mr. Neblett: I am sorry, I didn't hear your Honor.

The Court: Just the personal property, that is all.

A. Well, I don't have the figure on the personal property separately. We have it in the records but I don't happen to have it with me. This plant was treated as a unit.

The Court: Well, give me the figure on the whole thing, then.

A. The fair market value as established by the Appraisal Division without the National Security Clause being placed on the property was considered to be \$2,597,555. As a result of the National Security Clause being placed on the facility the value was reduced to \$1,400,000.

Q. (By Mr. Peckham): Do you know, Mr. Deede, what the ultimate consideration—what the final consideration was which the defendant paid?

A. \$1,201,500.

The Court: That statement was, fair value of the machine tools, removable property, approximately \$369,000? [116]

(Testimony of Ralph G. Deede.)

Mr. Peckham: \$366,000, I believe it was, your Honor.

Mr. Neblett: That appeared in Paragraph 9 of the Letter of Intent, your Honor.

Mr. Peckham: Yes.

Mr. Neblett: Without the Security Clause.

A. No, with the Security Clause.

Mr. Neblett: \$366,000.

Mr. Peckham: That is with the Security Clause?

Mr. Neblett: No.

A. Yes.

Mr. Neblett: If I may interrupt Counsel, Paragraph 9 of the Letter of Intent which Counsel just introduced, provides "in the event of restrictions of the National Security Clause are removed from the personal property to be transferred, the Government will release the personal property of the lien of the chattel mortgage on the payment of the total amount not to exceed \$366,600." There is the figure that is established as without the Security Clause. That is the figure which was incorporated in the chattel mortgage as the fair value of the property in which the Security Clause is not mentioned.

Q. (By Mr. Peckham): Well, Mr. Deede, you don't have any records with you from which you can testify that the value set upon the personal property, \$366,000 without—subject to the National Security Clause.

A. Well, it is included in the bill of sale, that figure, and [117] the personal property was also



(Testimony of Ralph G. Deede.)

subject to the National Security Clause and appears so in the bill of sale, and there was a separate release value placed on the personal property because it was the purchaser's intent to get that lifted from the mortgage and they wanted a specific figure, so there was a figure of \$366,000 was arrived at on a pro-rated basis, based on the acquisition cost of the entire plant against the sales price of the entire plant. That is how we arrived at the fair value on the personal property.

Mr. Peckham: At this time, I don't think it will be necessary to introduce these documents by any testimony, any testimony concerning them. I think that Counsel is willing to stipulate as to the bill of sale that was delivered to your client.

The Court: This is not a trial, Mr. Peckham, you know, it is just a motion for preliminary injunction. That is enough record on that.

Mr. Peckham: So long as it is deemed properly admitted, there will be no need to have any further testimony regarding the bill of sale.

Mr. Neblett: We admitted in our answer to the Complaint that is a true copy.

The Court: Yes. Cross-examination now, Mr. Neblett?

Mr. Neblett: Yes, your Honor. [118]

#### Cross-Examination

By Mr. Neblett:

Q. Mr. Deede, will you read to me, please, that letter that you introduced a while ago with your

(Testimony of Ralph G. Deede.)

testimony relating to the designation of the property under this Security Clause.

The Court: That was a telegram?

Mr. Neblett: Oh, a telegram, yes, sir.

A. I will see if I can find it again.

Q. You pointed out in your testimony that the designation which was received from the Washington office of W.A.A.—that is the Chief Administrator?

A. Yes.

Q. And you have checked here Moore Dry Dock Company, Oakland, California, M.C.-70588. Was that the whole yard or the part sold to Oakland Dock and Warehouse Company?

A. That was the part that was—that fee owned portion and leasehold portion, plus a portion of the improvements that were put on the east yard that were owned by Moore Yard—Moore Dry Dock Company.

Q. You are talking about three parcels now?

A. That is right.

Q. One parcel you are speaking of is included in that designation, was a scrambled facility with Moore Dry Dock's yard as far as involved in these proceedings?

A. That is right. [119]

Q. Then you are also talking about some 40 acres on the east part of the Moore Dry Dock west yard?

A. Right.

Q. Is that under lease from the Western Pacific Railroad Company to the United States Government?

A. That is correct.

Q. Did I understand you to testify now, that the designation which you have referred to is a

(Testimony of Ralph G. Deede.)

designation of Western Pacific lease and a fee portion purchased by Oakland Dock and Warehouse Company designated as under a Security Clause?

A. That is right.

Q. Have you ever had any designation under the Security Clause of the portion purchased by the Oakland Dock and Warehouse Company?

A. It was all treated as one unit. The fee owned portion and the leasehold portion, all one facility.

Q. Then the designation there is a designation of the Western Pacific lease, which is about 40 acres, isn't it?

A. That is right.

Q. Upon which are built the ways, is that correct?

A. That is right.

Q. I show you copy of an exhibit which was introduced in evidence at the opening of the case, which is a map of the yard, and that map came out of your office? You recognize it, do you?

A. Yes. [120]

Q. The portion, Moore Dry Dock sales yard which we are talking about here includes these two pieces, the part sold to Oakland Dock and Warehouse Company and the part which is now held by the Government under Western Pacific lease. What I would like to develop from your testimony to see whether there is something which designates that part of the yard sold to Oakland Dock and Warehouse Company as being under the Security Clause. separately under the Security Clause.

A. This was never treated as a separate unit. This was all one unit, the fee owned portion as well

(Testimony of Ralph G. Deede.)

as the leasehold portion, and it was under the National Security Clause. This was never broken down as two units. This was one unit, declared by the Maritime Act.

Q. Is it still treated as one unit?

A. As far as the National Security Clause is concerned it is still treated as one unit.

Q. Then, as I understand your testimony, there has been no separate designation of it from Washington or any department you know in Washington of the part purchased by Oakland Dock and Warehouse Company, namely, the outfitting portion of the yard, is that right?

A. Well, there has been a segregation in this manner, that when we were unsuccessful in selling this leased portion and the fee portion as a unit, then we split them up. We sold the fee owned land and being unsuccessful in selling the leasehold [121] interest subject to the National Security Clause, we were directed by the Washington office as a result of the Munitions Board directive that the leasehold be transferred to the Federal Works Agency of the Industrial Reserve and maintained as part of the Industrial Reserve, which we did.

Q. You don't have that part under your jurisdiction any more?

A. No, that is part of General Services but it is being handled by a different Division.

Q. I hope I don't repeat myself too much, but have you got designation permitting you to split

(Testimony of Ralph G. Deede.)

that yard into the portion which has ways, that is, the Western Pacific leasehold and the portion on which the outfitting part of the yard is outfitted, the part sold Oakland Dock and Warehouse Company, to sell that subject to the Security Clause? Have you any designation of this half of the yard that the Oakland Dock and Warehouse Company has?

A. No, it is all treated as one and we don't need a special directive.

Mr. Neblett: I move to strike that portion of the witness' answer what they need.

A. I wanted to indicate it wasn't necessary we receive any directive. We have authorization from the Administrator that we can sell this property in any manner we see fit so long as it brings the highest rate to the Government, and in this case we were directed to sell the facility under the National Security Clause, and other than that we could sell it in any manner we wanted.

The Court: Of course what Counsel is getting at, under the provisions of the bill of sale it says nothing should be done to interfere with the property—I am paraphrasing this—which interferes with the—which would materially reduce the capacity of the plant to produce the items for which it was designed. Of course his point is that if there was just sold off part of it you wouldn't be able to produce the items for which it was designed.

A. That is not true, your Honor, by reason of the fact that we kept the leasehold portion that is still being maintained by the Government. It is



(Testimony of Ralph G. Deede.)

still kept as a unit so far as the operation is concerned.

The Court: It is?

A. Part of it is sold subject to the National Security Clause, and the rest of it the Government has spent a lot of money on it to maintain it as a unit. Otherwise we could have terminated our lease. But that is still being maintained as a unit regardless whether part of it is sold. The balance is still there and controlled by the Government.

Q. (By Mr. Neblett): Why didn't you sell the Western Pacific lease?

A. Because what we had was a leasehold interest and the restoration of this in connection with the lease was subject [123] to that, and subject to the National Security Clause. There was no value there. That was the reason we couldn't sell it. Nobody would assume the restoration obligation and conditions under the National Security Clause.

Q. Isn't it a fact the reason you didn't sell it, it came to your attention the lease of the Western Pacific portion to the Government was invalid and had not been properly renewed?

A. That hasn't been established yet.

Q. Didn't that come to your attention?

A. That came to my attention last week.

Q. Do you recognize the signature of Mr. Don H. Biggs?

A. Yes, sir.

Q. Is that his signature on that lease?

A. Yes, I would say it was.

(Testimony of Ralph G. Deede.)

Q. Who was Mr. Biggs at the time this letter was written, June 14, 1945?

A. He was Director of Disposals at that time.

Q. Is that the same position you have now?

A. That is correct.

Q. Do you recognize what that document is that I show you and I just handed to Counsel?

A. Yes.

Q. What is it?

A. It is a letter to the Oakland Dock and Warehouse Company transmitting a photostatic copy of the lease with the Western [124] Pacific.

Q. You are familiar with that lease, aren't you.

A. Generally, yes. I haven't looked at it.

Q. Would you say that is an accurate photostatic copy that was sent by your office to the Oakland Dock and Warehouse Company?

A. Yes, I believe it is, yes.

Mr. Neblett: We offer it in evidence to show, your Honor, the condition in which the Western Pacific lease is at this time and also at the time the property was purchased or was supposed to be designated.

The Court: All right, I will admit it. Mark it.

Mr. Neblett: I would be happy to make a copy of this lease available to Counsel for the Government if he would like to have it.

Mr. Peckham: Well, I would be glad to see it, but what I think, the facts are pretty well established as to the lease. The Western Pacific prop-

(Testimony of Ralph G. Deede.)

erty is leased by the Government and does contain this National Security Provision.

The Court: I think that may be true, but I will allow it in evidence.

Mr. Neblett: I believe that is all, your Honor, from this witness.

Mr. Peckham: Nothing further.

The Court: All right.

(Witness excused.) [125]

The Court: I think you better put on the witnesses that are not really connected with this case first so they won't be kept waiting.

Mr. Peckham: Surely. I will call Mr. Wille of the Moore Dry Dock Company.

### ANTON L. WILLE

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Anton L. Wille.

### Direct Examination

By Mr. Peckham:

Q. Mr. Wille, are you the Purchasing Agent of the Moore Dry Dock Company?

A. That is correct.

Q. And how long have you acted in that capacity? A. About eighteen years.

Q. Now,—that is continuous. You were with the Moore Dry Dock Company at the time that they

(Testimony of Anton L. Wille.)

were using the west yard of the Moore Dry Dock Company that has been referred to in this case?

A. That's correct.

Q. In fact, Mr. Wille, did you have anything to do with the procuring with the tools that are located in that plant?

A. We purchased all of them through my division, through my department. [126]

Q. Now, are you familiar with the machine tools that are located in that plant at this time?

A. With a great many of them, yes.

Q. And you have been in the plant since the Moore Dry Dock Company ceased operation of the plant?

A. That is correct.

Q. Now, would you describe for his Honor generally the type of machine tools that are found in the establishment there, the Oakland Company yard?

Mr. Neblett: Your Honor please, we object to that question on the ground it is not the best evidence as a complete inventory of the War Assets Administration has and we have a copy of it, of the type and kind and character of the machinery. I object to that question; that is not the best evidence.

Mr. Peckham: Well, I was just expediting matters.

The Court: It may not be. Just tell me generally; I suppose it is lathes and planers and——

The Witness: Grinders and drill presses.

The Court: Drill presses, all that.

(Testimony of Anton L. Wille.)

The Witness: Some small lathes up to large lathes, sixty to seventy-two inch.

The Court: All that?

The Witness: That is right.

The Court: Did you buy from Bulotti and Moore Machining?

The Witness: That is correct. [127]

The Court: I have a general idea. I was attorney for Moore Machinery.

Q. (By Mr. Peckham): Mr Wille, have you, were you acquainted in your capacity as purchasing agent with the conditions of the market in machine tools during the present time?

A. That's right.

Q. And referring now, directing your attention now to the heavy special purpose type of machine tool that is found there at the Oakland Company yard would you tell us what—how easily that type of machine tool can be procured at the present time?

A. Well, on the heavy tools you probably have to wait four to six to eight months for some of them, maybe a little bit longer for the extra large lathes like you find over there, sixty inch, and so forth.

Q. And there is that type of machine tool located there at the Oakland Company?

A. That's correct.

Q. And——

The Court: Is there that much lag in the tool machine business?

The Witness: On the large tools, yes, your Honor.



(Testimony of Anton L. Wille.)

Q. (By Mr. Peckham): In other words, it would—a period longer than a hundred and twenty days would be required to procure the special purpose type of machine tool that you find at Oakland?

A. On some of the large tools I would say yes.

Mr. Neblett: I object to this line of questioning. No issue raised on how long it would take to procure these tools.

The Court: I think it is relevant on the question of irreparable damage. In other words, should a war start tomorrow six months to get the lathe would be some evidence of irreparable damage.

Q. (By Mr. Peckham): Now, Mr. Wille, do you—put it this way—when did you last see the machinery, machine tools there at the Oakland Company; do you recall?

A. Last time I was over there was about in—in the machine shop about four or five months ago.

Q. I see, and your company recently purchased a Blanchard grinder from the Oakland Company?

A. That is right, two weeks ago.

Q. Have you seen that Blanchard grinder?

A. No, I have not seen that personally; I didn't look at it.

Q. From your long experience as a purchasing agent of machine tools, what is the useful life of equipment such as the equipment that you find there at Oakland Company yard?

A. Under normal working conditions we assume about twenty years, fifteen to twenty years. If it is

(Testimony of Anton L. Wille.)

abnormal, working three shifts, then it is going to be proportionately less.

Q. Now, Mr. Wille, as a purchasing agent during the years of 1940 through 1945, would you describe to his Honor the conditions that existed in the market, machine tool market, [129] as to the purchase of special purpose machine tools, as to how readily procurable they were?

A. During the—in the early '40's?

Q. Yes.

A. Many of those tools we waited, oh, from five to twelve, fifteen months before we could get delivery of them.

The Court: They were a drug on the market about 1939, business was bad, and from then on business was very good.

The Witness: That is correct.

The Court: I know those facts and take them into consideration. I was director of the Moore Machinery Company for a long time, so I know what is going on.

Mr. Peckham: Your Honor, I just asked for the record at the last National Emergency there was difficulty in procuring machine tools.

The Court: Of course, that doesn't apply. That was back in 1940, the question now what is the time.

Mr. Peckham: Yes, in the event there would be a National Emergency, assuming those conditions would exist again.

No further questions.

The Court: Let me ask you this: This one-half

(Testimony of Anton L. Wille.)

of the so-called yest yard, the part that was leased from the Western Pacific, can that be operated as a ship repairing or ship fitting plant?

The Witness: I believe it can with the addition of some [130] dry docks.

The Court: Have to have some dry docks?

The Witness: That is correct.

### Cross-Examination

By Mr. Neblett:

Q. Mr. Wille, you said the normal rate of depreciation on this machinery tools and equipment would be fifteen to twenty years?

A. That is what we figure it, that's right.

Q. What rate of depreciation do you take on your yard on your income tax?

A. I believe it is twenty years on the heavy tools.

Q. Well, what about such tools as electric welders and mobile cranes and things of that sort?

A. They are mostly in the five year category.

Q. In the what? A. Five years.

Q. What about small tools such as screwdrivers, drills and things of that sort?

A. We call those expendable. They are depreciated the minute they are purchased.

The Court: You don't mean drill presses?

The Witness: No, no; small portable drills and drills, such things as electric and pneumatic drills.

Q. (By Mr. Neblett): What about cranes, Wurlley cranes?

(Testimony of Anton L. Wille.)

A. I think they come within the ten year class. I wouldn't [132] bet on that on the Wurleys.

Q. Isn't it a fact that the Navy Department and the Maritime Commission builds a yard such as the Moore Dry Dock Company west yard with the idea they will be almost depreciated and gone four years after they are constructed?

A. I believe that applies to the building ways and piers and the temporary buildings. I don't believe that applies to the machine tools.

Q. That is true of the ways on the Western Pacific lease and piers that are built?

A. I believe that is correct; yes, sir.

The Court: Didn't that apply originally to the time they are constructed there, wasn't there a five year allowance by the Internal Revenue laws?

The Witness: I believe, I am not sure. I am not positive whether that covered the tools or not. I know it covered the buildings and ways, piers, built on a three or four year basis, but——

Q. In other words, nothing in a shipyard is good for ship repair or ship building after four or five years, is that right?

A. It could be for ship repair, because after all you can rehabilitate those facilities; in fact, some of them were rehabilitated before the war was over.

Q. They had been rehabilitated, is that right?

A. That's right. [133]

Q. But the normal life considered by the Maritime Commission is four years, isn't it?

(Testimony of Anton L. Wille.)

A. For the general yard, the yard in general, I believe that is correct, yes.

Q. And the general depreciation allowed by the Income Tax Department is about seven years, isn't that right?

A. That I am not qualified on. I am not in the accounting division, I wouldn't know that for sure.

Q. When was this yard built?

A. I believe we started early in 1941, late '40 or early '41 when we put the first work in there.

Q. So it is about nine years old?

A. Practically, yes, sir.

Q. And the machinery and machinery tools and equipment, such as heavy cranes and things of that sort are gone, according to your calculation, in about ten years, is that so?

A. That's right, some of them.

Q. And on heavy machinery of that type are being depreciated very rapidly beyond use after about ten years, any kind of machinery, isn't that so?

A. All of it needs maintenance and service. Machines out in the weather are far worse off than under cover.

Q. Do machine tools and machinery go to pieces more quickly when not in use than when they are in use?

A. Well, from experience I will say it doesn't do them any [134] good when they are not in use.

Q. Well, most of the—in other words, they de-



(Testimony of Anton L. Wille.)

preciate very rapidly if they are not in use, standing out in salt air with no maintenance?

A. That is quite true.

Q. Never been any maintenance on this yard, isn't that so?

A. I don't know what they have done since late '45. I don't believe it has had much maintenance.

Q. It has been watched and for the purpose of looking after the machinery tools and equipment to keep them from disappearing and also watch them from the standpoint of fire hazard, I guess, is that so?

A. I believe so.

Q. Isn't that about all that has been done?

A. That I wouldn't know, because I am not qualified. I haven't been over there to see. I do know some of the machine tools have been in use for the last four or five years under lease.

Mr. Neblett: That is all.

Mr. Peckham: Just one or two questions.

### Redirect Examination

By Mr. Peckham:

Q. The Moore Dry Dock Company has purchased recently machine tools from the Oakland, Company, has it not?

A. That is correct.

Q. And has it put those machines in use? [135]

A. I believe they are all in use now, that's right.

(Testimony of Anton L. Wille.)

Recross-Examination

By Mr. Neblett:

Q. Has there been any rehabilitation of them?

A. Personally I do not know.

Mr. Neblett: No further questions.

Mr. Peckham: That is all.

(Witness excused.)

Mr. Peckham: Mr. Bulotti.

CHARLES F. BULOTTI

called as a witness on behalf of the Government,  
being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Charles F. Bulotti.

Direct Examination

By Mr. Peckham:

Q. Mr. Bulotti, you are the owner and operator  
of a machine company, are you not? A. Yes.

Q. And that is the Charles Bulotti Machinery  
Company? A. The C. F. Bulotti Machinery.

Q. Yes. And you have been engaged in that  
business for a number of years? A. Yes.

Q. And you were familiar with much, are you  
familiar with any of the machine tools that were  
supplied to the west yard of [136] the Moore Dry  
Dock Company in Oakland, California?

A. Quite a few of them, because we sold them.

Q. Are you familiar with special purpose ma-

(Testimony of Charles F. Bulotti.)

chine tools that were furnished to the Oakland Company, to the Moore Dry Dock yard?

A. Well, now, the definition of special purpose is a little bit confusing, but those machine tools in general, I am familiar with them.

The Court: You can gig and lag a machine tool for a special purpose job?

The Witness: Yes.

Q. (By Mr. Peckham): Well, as to the heavy equipment, Mr. Bulotti? A. Yes, sir.

Q. Could you testify as to how readily it is procured at the present time?

A. Yes, I had occasion to check my records this morning. I find on the larger lathes, such as fifty inch size, it would require from sixteen to twenty weeks. A sixty inch by fifty-one foot, the very long lathe, probably be six months up. Not many of them made. There were only two sources of supply in the country for the very large lathes.

Q. Would you testify, Mr. Bulotti, as to the length of usefulness of heavy type of machine tools?

A. Well, some tools that my old company sold during World [137] War I are still in use; that was in 1916. They have a big boring mill machine since 1916, have some lathes bought at the same time, still in use.

The Court: Of the larger machine tools, what do they have over there?

The Witness: A sixteen foot boring mill, eight foot lateral drills, then they have two or three Gid-

(Testimony of Charles F. Bulotti.)

dings and Lewis and horizontal boring machines, and a big seventy-two or eighty-four king mill, then, of course, there are the large presses that came from Chicago; they were used, I think, in the plate shop, they call it, but the heavy machine tools are very slow in delivery, even as of this date.

The Court: What was this machine tool that was sold recently?

Mr. Peckham: Well, it was——

The Court: What did it consist of?

Mr. Peckham: A turret lathe and a Blanchard grinder.

The Witness: Turret lathes are now about sixteen weeks and a Blanchard grinder, I am not in a position to state, because I have no comparable lathe.

Q. (By Mr. Peckham): Being familiar with the machine tools that are located there at the yard, Mr. Bulotti, would it be your testimony that the machine tools that are necessary to operate the yard, could not be assembled within 120 days, could not be procured? [138]

A. That is true, with the exception of one or two small items; I would say that is true.

Mr. Peckham: No further questions.

### Cross-Examination

By Mr. Neblett:

Q. These machine tools and equipment you spoke of could be obtained from sixteen to twenty weeks, have you bought any lately?

(Testimony of Charles F. Bulotti.)

A. We received monthly——

Q. Have you bought any lately; answer the question. A. No, sir.

Q. When did you last buy any?

A. Six weeks ago.

Q. How long did it take to get delivery?

A. Three months.

Q. What did you buy?

A. A small turret lathe.

Q. When you testified a while ago that it would take 120 days that these tools couldn't be supplied within a 120 days, you are aware that 120 days are four months? Now, you say you bought some of these machines, tools, and they were delivered in three months, did I understand?

A. Small. I will give you one in a week, also. We get monthly lists from the factory and I have made it my job to look at that list this morning, and you can't get a large lathe in less than six months. When you ask me if—there has been no [139] demand for machine tools.

Mr. Neblett: I move all of the witness' testimony based upon the subject that he received a list from the manufacturers, that is hearsay and not the best evidence, that doesn't prove when manufacturers can manufacture and sell.

The Court: I will let the evidence stand because the witness testified to the effect that it takes from sixteen to eighteen weeks to six months to get machine tools of this character and if you want to have him qualified any more for the record, I know



(Testimony of Charles F. Bulotti.)

him to be a very qualified individual, has been in the machine tool business and for years one of the biggest operators on the Coast.

Mr. Neblett: I won't pursue it any further.

The Court: Yes.

Mr. Neblett: I believe that is all.

(Witness excused.)

Mr. Peckham: Admiral Klein.

### GROVER C. KLEIN

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Grover C. Klein, Rear Admiral, U. S. Navy.

### Direct Examination

By Mr. Peckham:

Q. Admiral Klein, what is your present position with the United States Navy? [140]

A. Inspector General for the Bureau of Ships.

Q. And you are stationed here in San Francisco?

A. I am.

Q. And what are your duties, sir?

A. To make such inspections of the facilities and management control installations under the Bureau of Ships as the Chief of the Bureau of Ships or Command, Western Sea Frontier, may order.

Q. Prior to your assignment as Inspector Gen-

(Testimony of Grover C. Klein.)

eral, Admiral, were you an assistant, were you the Assistant Chief of Bureau of Ships for Facilities at Washington, D. C.?      A. I was, sir.

Q. And during what time did you act in that capacity?

A. From April of 1947 until April of 1950.

Q. Will you state briefly for His Honor your duties in that capacity?

A. Well, I had general charge of the sections which were concerned with facilities used and required for the Bureau of Ships for its peace time uses and for its mobilization plans. In addition, we—our division had charge of the organization of the yards and of its labor relations.

Q. In your capacity with the Bureau of Ships as an Assistant Chief in 1947, do you know, Admiral, did you have any knowledge of the designation of the west yard of the Moore Dry Dock Company as part of the Industrial Reserve? [141]

A. I would have knowledge of that, yes.

Q. Did your section or bureau have, did it make the determination?

A. We did not make the determination. We made the recommendation to the Munitions Board that the determination be made and the Munitions Board made the determination to place the plant within the Reserve.

Mr. Neblett: Your Honor please, I didn't know what the witness was going to testify to on that last. I move that part of his testimony be stricken

(Testimony of Grover C. Klein.)

out, that the Munitions Board made the determination, because it isn't the best evidence.

Mr. Peckham: Your Honor, as I understand it, though I may be mistaken, on a hearing on an application for preliminary injunction where evidence is offered, there is a greater latitude given as to evidence.

The Court: Well, of course, what the—among the records isn't there a determination of designation signed by the Munitions Board, by Major General Timerlake?

Mr. Neblett: That is attached to the Complaint, or affidavit, I have forgot which, a letter dated May 7, 1948, signed by Major General Timberlake. That letter doesn't designate it, it merely—it is merely sent in 1948 to the General Services of the War Assets Administration it was then, saying in effect holding it open thirty days and another designation to be made. Never any designation made at all, [142] your Honor, even that letter. That letter merely says that there is attached hereto a tentative list of 114 facilities he considered necessary to the national defense and consequently should be disposed of by the National Security Clause. Continuous studies are continuing with regard to the facilities on this tentative list and it is anticipated that within approximately thirty days certain deletions may be possible. The Military Department expect to continue field checks on the physical condition on most of these facilities. Therefore, it is requested that your field organiza-

(Testimony of Grover C. Klein.)

tions be asked to cooperate by permitting them to make a physical inspection of these properties.

The Court: Well, Admiral, how do you know they were designated?

The Witness: We placed before the Munitions Board a list of the facilities which were necessary for the Bureau of Ships to carry on its mobilization plans. We received information from the Munitions Board that we, the Bureau of Ships, could use those plants in our plans, and as a result of that we designated the present yard under discussion as the building yard for certain ships in our mobilization plans. Now, that was the sum and substance of it.

The Court: You did that on the assumption that the letter had been drawn?

The Witness: No, we had word from the Munitions Board those plants were available to us. [143]

The Court: That was by letter, was it?

The Witness: Yes, sir.

The Court: Have you got a copy of the letter?

The Witness: No, sir, I don't have. It is in the files in Washington.

Mr. Peckham: On this question of designation, your Honor, there is—that list, the instructions that Mr. Deede has testified to the War Assets Administration received, the provisions themselves, and the deed and the bill of sale.

The Court: Let us not discuss what the evidence is.

Mr. Peckham: Yes, your Honor.

(Testimony of Grover C. Klein.)

The Court: I have to adjourn on this case to another one at 3:30 and have to take this in the morning, but suppose you finish with your witnesses today. Will you be able to?

Mr. Peckham: Well, I think—this just about completes our—one or two more questions, your Honor.

The Court: All right.

Q. (By Mr. Peckham): Well, Admiral Klein, you're familiar with the type of construction and ship repairing that took place during the war at Moore Dry Dock Company?

A. Not in detail, not the type of construction. I am familiar with the general layout of the plant from the plans only and the type of ship we can build there. I am not at liberty to disclose what ships we have programmed for there, but we have ships programmed and they are the type that can be built there. [144]

The Court: You mean with the tools that are there now?

The Witness: With the tools that are there now, augmented to some extent with additional tools, and by having certain fabrication done at other plants.

Q. (By Mr. Peckham): Admiral, this plant is considered as one of the essential plants in the Industrial Reserve necessary in the case of a National Emergency? A. That is correct.

Q. Now, Admiral, during the past National



(Testimony of Grover C. Klein.)

Emergency, during the past war, particularly the early part of the war, were you familiar with the conditions that existed in the mobilizing of plants and the equipment of plants?      A. I was.

Q. Of this type. And would it be your testimony that this plant could not be assembled in a 120 days, in the event that the machine tools have been disposed of?

A. That is correct, the machine tools and the weight handling equipment.

The Court: You mean by that the cranes?

The Witness: Yes.

Q. (By Mr. Peckham): And the Department of Defense looks upon this yard as necessary for the National Defense as an integrated yard?

A. I can speak for the Bureau of Ships, yes; but not for the Department of Defense, I am sorry. The Bureau of Ships as a [145] part of the National Defense establishment does look on this as a Reserve plant required for our mobilization plans in case of an emergency, and also the timing, the phasing of the construction of ships will require its use within 120 days.

Mr. Peckham: No further questions.

#### Cross-Examination

By Mr. Neblett:

Q. Admiral, could the yard be used with the piers in the general condition of the yard now? Could it be used now or be back at work in 120 days?

(Testimony of Grover C. Klein.)

A. I have not seen the yard, but from the information I gather from people and from—from people who have seen it and from the records I would say it would be difficult.

Q. Does your information on the, say, Western Pacific lease where the ways are, is it your information that the ways are pretty badly deteriorated at this time?

A. Yes, but not to the extent it would require an inordinate time to put them in commission. In ship building you have a certain period of time where you fabricate material and it don't require the ways.

The Court: Will you excuse me just a minute? All right, go ahead.

A. I say there is a period of time during the earlier part of putting a shipyard into operation when the ways are not required. It is a fabrication period. You have your plans to get ready and a certain period where you are fabricating before you go [146] directly on to the ways.

Q. (By Mr. Neblett): Well, is it your information now that the piers on the outfitting portion of the yard, the part owned by Oakland Dock and Warehouse Company are deteriorated to the point where they couldn't be used without extensive repair and even replacement? Is that your information?

A. For ship building?

Q. The ship repairs.

A. Piers are only used in a ship building plant for outfitting. That is to say, they do not come

(Testimony of Grover C. Klein.)

until after launching. The piers could be rehabilitated even though they were deteriorated down to the water line where the piles are rotted off, in my opinion, within that period.

Q. How long is that?

A. Seven or eight months.

Q. Could you use the yard at all as an outfitting yard or ship repair yard until the piers were rehabilitated?

A. You could use it as a ships construction yard.

Q. What?

A. Ships construction yard. Building ships. Your shops are usable in the early part. You have your plans and material. You start the fabricating. From the fabricating shops you go to the ways, and from the ways to the piers for fitting out. Now, there is a hiatus or period of time from the time you receive your material until that material is fabricated and [147] then from then until your ship is off the ways until you put it to the fitting out here. If you ask me can the piers be used for repair until rehabilitated I couldn't tell you even if I looked at them.

The Court: Well, there was testimony this particular property that was purchased by the defendant here could not be used for ship repair or rehabilitation of ships until the ways were repaired.

A. Well, sir, I believe we are concerned here with language. In ship building ways are the lo-

(Testimony of Grover C. Klein.)

cation with launching ways on which ships are constructed from the keel up. Our outfitting piers or conversion piers are piers that stick out into the water along which you can bring a ship and work on it while it is afloat. I am not sure I understand what the testimony was before, but speaking of ways, ship building ways, it isn't concerned with the business of conversion or repairs.

The Court: I see.

Q. (By Mr. Neblett): Admiral, do you recall having met Mr. Agostini and myself in Washington?

A. I recall meeting you, sir. I don't recall meeting Mr. Agostini.

Q. Well, Mr. Agostini is President of the Oakland Dock and Warehouse Company. A. Yes.

Q. But you do recall that I spent around seven months on this [148] problem? A. Yes, sir.

Q. In which I interviewed your assistants many times, Captain Gridley and——

A. That is right.

Q. ——Mr. Stein and others and had some interviews with you, also. A. That is correct.

Q. Do you recall that out of these discussions with you and others the Munitions Board finally re-formed and modified the quit claim deed with respect to the property?

A. I don't recall that as a matter of knowledge from my activities there, but I do recall seeing a piece of paper which indicated that that was done.

(Testimony of Grover C. Klein.)

Now, that is the extent of my personal knowledge of it.

Q. Well, I don't recall now whether you were there or not, but I will ask you: At one time the question came up with Captain Zitswitz. He was your superior and in the Engineers?

A. He is the same ilk I am. He is Engineering duty only and shipbuilding.

Q. You and he are both Annapolis men?

A. That is correct.

Q. You don't recall anything further happening after I saw you the last time, which was, I think, some time in January of this year? [149]

A. Well, I recall many things happening, but as this case——

Q. I am talking about this case, of course.

A. Yes.

Q. I won't pursue that question any further.

Mr. Neblett: That is all from this witness, if your Honor please. The witness says he doesn't remember the modification.

The Court: Well, you have the modification in the record, anyway.

Mr. Neblett: Yes, your Honor.

Mr. Peckham: Yes.

The Court: Is it in the record?

Mr. Peckham: If it isn't we certainly can stipulate it be placed in. I believe it is attached to the counter affidavit of Mr. Agostini.

The Court: I have another matter now. Are you finished?



Mr. Peckham: Yes.

The Court: I have another matter that is coming up that has to be decided before the Grand Jury meets tomorrow, and would it be all right with you, Mr. Neblett and Mr. Peckham, to continue this matter tomorrow at 10:30?

(Colloquies between Court and Counsel omitted.)

The Court: I think I can finish the calendar by 10:30 and we can start in and continue this case then. Continue this case until 10:30 tomorrow morning.

(Thereupon this cause was adjourned to Wednesday, June 21, 1950, at the hour of 10:30 a.m.) [150]

Wednesday, June 21, 1950, 10:30 o'Clock A.M.

The Court: United States versus Oakland Dock & Warehouse Company.

Mr. Peckham: Ready for the Plaintiff.

Mr. Neblett: Ready for the Defendant.

Mr. Peckham: Your Honor, yesterday we completed our oral testimony. At this time I would like to ask, if Counsel has no objection, that the reports of Congress of the Munitions Board pertaining to the National Industrial Reserve be admitted in evidence.

The Court: Those you referred to in your argument?

Mr. Neblett: No objection. I would like for Counsel to identify the two reports by date.

Mr. Peckham: Report to Congress on April 1, 1949, and the second volume is Report to Congress of the Munitions Board of April 1, 1950. One exhibit will be all right.

The Clerk: Plaintiff's Exhibit 3 introduced and filed in evidence.

(Whereupon the Report above referred to and marked Plaintiff's Exhibit 3 was received in evidence.)

The Court: You rest, do you?

Mr. Peckham: Yes.

The Court: All right, proceed with your evidence. [152]

Admiral Klein, please.

Mr. Neblett: Admiral Klein has been sworn.

### GROVER C. KLEIN

having been previously sworn, called as a witness on behalf of the defendant.

Mr. Neblett: Your Honor, before I proceed with this witness, may I offer in evidence on behalf of the defendant the Answer, the verified Answer of the defendant to the Complaint, and the Affidavit of Mr. Agostini, President of the corporation, which appears in the files.

The Court: All right, admitted.

### Direct Examination

By Mr. Neblett:

Q. Admiral Klein, when did you first come in contact with this proposition of the Oakland Dock

(Testimony of Grover C. Klein.)

& Warehouse Company, first to remove the security clause altogether from the properties, and then later to modify it?

A. Well, I can't recall, I cannot recall the exact date, but to the best of my recollection it was some time in 1948.

Q. Well, keeping in mind that the Oakland Dock & Warehouse Company purchased the property on June 1, 1949, and that the application of the Oakland Dock & Warehouse Company was filed July 12, 1949, some time shortly after that, I suppose?

A. It must have been in 1949, rather than in 1948, but without the documents to refresh my mind I cannot recall the exact time [153] of the transactions. There were so many of them that we handled.

Q. Well, the first time that you and I had a conference with Captain Zitzswitz and Mr. Wheeler, Mr. Wheeler was representing the Oakland Dock & Warehouse Company with me; you remember him, do you not? A. I do, yes.

Q. The Company lawyer that appeared with me?

A. Yes.

Q. And that was some time in the fall of 1949, was it not, we first got together?

A. That could be. I am sorry I can't recall these times. As I say, there were many transactions that had to do with the disposal of property and with the application of the National Security Clause.

Q. Who is the Honorable John T. Koehler?

(Testimony of Grover C. Klein.)

A. He is now the Assistant Secretary of the Navy.

Q. He was during 1949 also, was he not?

A. To the best of my recollection, yes. He was also the Counsel for the Bureau of Ships prior to the time he became Assistant Secretary of the Navy, and I do not recall the exact date when he changed office.

Q. Well, as a matter of fact, it was in February, 1949; that is about right, isn't it?

A. Sounds reasonable.

Q. And he was—did he have any position on the Munitions Board [154] in 1949 and 1950?

A. Well, he has had the position on the Munitions Board to my knowledge, yes. At one time I believe he was Acting Chairman of the Munitions Board.

Q. But at all times since around June 1, 1949, Mr. Koehler has been the Navy Member of the Munitions Board, isn't that true?

A. I am sure he was, but I can't testify to a paper that I saw to that effect.

Q. Just asking you from your general knowledge.

A. Just general knowledge, yes he was, and he acted as a member of the Munitions Board, that is correct.

Q. And for a time when the Board had no Chairman, Mr. Koehler was Acting Chairman, isn't that true?

(Testimony of Grover C. Klein.)

A. That is correct, from my general knowledge.

Q. Do you know Mr. Koehler's signature?

A. I do.

Mr. Neblett: I am showing counsel a letter I am going to show the witness.

Q. Admiral, I show you a letter dated September 16, 1949, written on Munitions Board stationery, dated Washington, D. C., purportedly signed by John T. Koehler, Acting Chairman. Is that Mr. Koehler's signature?

A. I would say that it is.

Mr. Neblett: If Your Honor please, I would like to read this [155] letter into evidence, if I may.

Munitions Board, Washington 25, D. C.,  
16 September, 1949.

Messrs. Neblett, Mayock & Wheeler,  
Washington Hotel, Washington, D. C.  
Oakland Dock & Warehouse Co.

"Dear Sirs:

"This will acknowledge receipt of your letter of September 12, 1949, addressed to me as the Assistant Secretary of the Navy in which you replied to mine of September 9, 1949, which I signed as Acting Chairman of the Munitions Board.

"The matters you now discuss are by and large the same as those which you brought to our attention in earlier letters. It is my view that our position on these matters is adequately stated in the letter that I sent you a copy of on September 9. You contend that the Munitions Board miscon-



(Testimony of Grover C. Klein.)

strued the subject matter of your Petition, which you describe as one for the removal of the dormant estate on the subject property and which we have referred to as one for removal of the National Security Clause.

“Notwithstanding the fact that the deed speaks in terms of dormant estate and we speak in terms of National Security Clause, we are really talking about the same thing. Public Law 883, 80th Congress, [156] defines the National Security Clause as those terms, conditions, restrictions and reservations formulated for insertion in instruments of sale or lease of property determined to be a part of the National Industrial Reserve which will guarantee their availability of such property for the purposes of national defense.

“In your deed these terms and conditions commence on Page 3 with the words, ‘and subject to the following covenants and conditions’ and run through to the words on Page 6 ‘shall furnish evidence of such recordation to the War Assets Administration.’

“In your Bill of Sale they commence on Page 1 with the words ‘the Government-owned portions’ and run through to the words ‘dormant estate mentioned above.’

“On Page 2 these are the provisions which I assume you are seeking to us or asking us to waive and which the Board at its meeting of September 8, 1949, declined to remove.

“I should like to repeat the suggestion made in

(Testimony of Grover C. Klein.)

our letter of the 9th that you advise us of any specific plans you may have for utilizing the property which would require a modification or waiver of some of the restrictions in the instruments of conveyance. Such advice would happen to decide whether individual [157] exceptions can be granted in those instances.

“Sincerely yours,

JOHN T. KOEHLER,  
Acting Chairman.”

Q. Admiral, were you familiar with this letter about the time it was written or not?

A. I must have been, because I was there at that time and I now recall the time when you were in Washington and requested a modification of the National Security Clause, and if my recollection serves me correctly, you were in the office and were interested in getting certain portions of the land released in order that you might build a building. Is that the time you speak of?

Q. That is one of the times, Admiral. I recall that time quite distinctly.

A. That you had this letter; I'm not sure as to time.

Q. Now, you don't have the file, of course, but do you recall that the first application Oakland Dock & Warehouse Company made was on July the 12, 1949, and that application was to remove the security clause entirely; do you remember that?

(Testimony of Grover C. Klein.)

A. I can't state that I remember the specific time. I do know that your company and you requested to have the National Security Clause removed; I do know that.

Q. And that is what Mr. Koehler was speaking about in this letter when he said that application was denied? [158]

A. And then subsequent to that you—we suggested that we might be able to release or relieve some of the land that was back from the piers in order that you might build a warehouse.

Q. There were all sorts of proposals and counter proposals made. A. That is correct.

Q. As I recall there is a very big file on it, isn't there? A. There is.

Q. And do you recall then that Mr. Agostini and I, with Mr. Wheeler—I don't say you saw Mr. Agostini because you said you don't recall—following this letter of September 16 we went before the Navy and the Munitions Board and made application to modify the Quit Claim Deed; do you remember that?

A. I do not recall that. I believe that question was raised yesterday, and the only recollection I have of that part of the transaction was the file. I saw—is that I saw in the file some modifications of it at a subsequent date. I do not recall the occasion when or what led up to the time that the deed was modified.

Q. Well, do you recall when these discussions came up about modifying the deed in accordance

(Testimony of Grover C. Klein.)

with the subject matter in Mr. Koehler's letter of September 16 which I believe, which has been marked by the——

The Court: Hasn't been marked yet, but you can mark it.

The Clerk: Defendant's Exhibit—— [159]

The Court: You have marked one exhibit in here, haven't you, for the defendant?

Mr. Neblett: Yes, Your Honor, I have forgotten the number.

The Clerk: Is this for identification?

The Court: Yes, Exhibit B.

The Clerk: Defendant's C introduced for identification.

The Court: Yes. I will admit it in evidence, not for identification. Just admit it in evidence.

The Clerk: Defendant's Exhibit C admitted in evidence.

(Whereupon the document above referred to and marked Defendant's Exhibit C was received in evidence.)

Q. (By Mr. Neblett): Do you recall then that we went back to the Munitions Board; you were there, I know you had a thousand and one of these things and I must *say your* defense at that time, if one is needed, that I was working on only one thing, and you were working on a dozen. That is the reason I am asking you to refresh your memory on these questions.

Do you recall that from your information under

(Testimony of Grover C. Klein.)

the Department generally that Mr. Mayock and Mr. Wheeler and I with Mr. Agostini went back to the Department and asked for a re-designation of this property as a terminal warehouse facility?

A. No, I don't recall any time where you asked to have it re-designated as a warehouse facility. I do recall that you requested that you be relieved of the National Security Clause to the [160] extent that you could build a warehouse on the property.

Q. Well, that is about the same thing.

A. And we had considerable discussion with you as to the location where it might be put so as not to interfere with the purposes for which we had it programmed.

Q. Who is Captain W. F. Christmas?

A. Christmas is one of the Assistants of Code 750 which has to do with mobilization planning. I believe that he has now been relieved of those duties.

Q. I mean what he was then, wasn't he attached——

A. At what time, now?

Q. I am talking about the time we are talking about, from June 1, 1949, until this modified Quit Claim Deed was executed on February 28, 1950?

A. I do not believe that he was attached to that Code for that whole period. My recollection is that he came there in the Fall, late Fall of 1949, and has now been relieved as the Assistant of Captain Hamilton.



(Testimony of Grover C. Klein.)

Q. Do you know Captain Christmas well?

A. Oh, yes.

Q. Would you know his signature?

A. I believe I would.

Q. I have shown this letter to counsel, if the Court please.

A. This was the period of time, this letter is dated and was actually during the period of time that Captain Christmas was [161] attached to the Munitions Board. He was, before he came into Code 750 of the Bureau of Ships, attached to the Munitions Board, and this letter undoubtedly was executed during that period of time, and is dated 18 October. That would show that Captain Christmas was still attached to the Munitions Board in October of 1949 and that he represented the Bureau of Ships some time subsequent to that date, which was probably the late Fall.

Q. There is no doubt about his authority to write that letter for the Munitions Board, is there?

A. I can't testify as to that. I wasn't attached to the Munitions Board, but my assumption would be that he was authorized to write the letter.

Mr. Neblett: We offer this letter in evidence, if Your Honor please, and I would like to read it to the Court.

The Clerk: Defendant's Exhibit D, introduced and filed in evidence.

(Whereupon the letter above referred to, dated 18 October, 1949, and marked Defendant's Exhibit D, was received in evidence.)

(Testimony of Grover C. Klein.)

Mr. Neblett: On the letterhead:

“Munitions Board,  
“Washington 25, D. C.

“18 October, 1949.

“Mr. William H. Neblett,  
Oakland Dock & Warehouse Company  
Washington Hotel,  
Washington, D. C. [162]

“Dear Mr. Neblett:

“In conference with your Mr. Welburn Mayock, in the office of Captain Walter F. Christmas, yesterday, it was agreed that Mr. Mayock would submit a new proposal to the Munitions Board asking that the National Security Clause be retained on the Oakland Dock & Warehouse Company property in question as a terminal warehouse rather than a shipyard. It is assumed that this new proposal will make unnecessary replying to your letter of 4 October, 1949.

“Sincerely yours,

“W. F. CHRISTMAS,

“Captain, U.S.N., Assistant Chief Office of Production Planning.”

Q. Do you recall that we filed such an application, Admiral, for modification of the Quit Claim Deed?

A. Well, I believe that is the same question I answered a moment ago. I do not recall your filing the application or the conference that went on, that

(Testimony of Grover C. Klein.)

preceded the modification of the Quit Claim Deed. I don't recall that. The only recollection I have of that is seeing in the files a modification of the Quit Claim Deed.

Q. You knew that we were discussing the matter from time to time with Captain Zitzewitz, your assistant, is that right?

A. As to the use of the property, yes.

Q. And you recall also of meeting, that you went with Mr. [163] Wheeler and myself on two occasions, if my memory serves me right those meetings were in January of 1950, or about that time, and at that time you recall our discussing at length the plan for the building of terminal warehousing and refrigeration plants on this property, and asking that the Security Clause on the land be modified so that we could establish both buildings; do you remember that?

A. I recall that we had a lengthy discussion as to the use of the land for terminal warehouses, and how we could fit the buildings that you had proposed to build as terminal warehouses to its future use as a shipbuilding plant. But I do not recall a discussion which would lead to the modification of the Deed to the extent that the National Security Clause would be removed.

Q. I don't recall any such discussion either. I do recall discussions that as to the land we were asking you to modify the Security Clause in the Quit Claim Deed. You will recall that—do you re-

(Testimony of Grover C. Klein.)

call that we stated to you at that time that we were coming in under Paragraph 3 of the Quit Claim Deed, which gave the Oakland Dock & Warehouse Company the right at that time to apply for removal of the clause, or modification of the clause; you recall that, do you not?

A. No, sir. I recall our discussion as to the use of the land, but I do not recall a discussion on the removal of the clause or a modification of the clause, because it doesn't appear to me now and I don't think it would have then that the clause need be removed [164] or modified so long as the construction that you placed on the land would not interfere with ship construction.

Q. Well, we didn't come to any agreement when you and I were discussing, did we?

A. That is correct.

Q. We were at opposite ends of the pole so far as agreement was concerned?

A. That is correct.

Q. Then it went back to Mr. Koehler's office and Mr. Harold Gros, who is now Chief Counsel for the Navy, went to the Counsel for the Bureau of Ships, Mr. Albert Stein, is that correct?

A. I know that Mr. Stein was called in on the subject, but as to the path the papers went, I'm not in a position to testify. I don't know who handled them, I do not know who handled them subsequent to the time of our discussion.

Q. Well, you were—do you recall that the Munitions Board referred this application for re-design-

(Testimony of Grover C. Klein.)

nation, I will call it, for a better word, or the modification of the Quit Claim Deed on the land to the National Security Resources Board, to Army, Navy and Air and to the Maritime Commission; do you recall that?

A. Would you please state your question again?

Q. Do you recall that the Munitions Board referred the affidavit, the application of Oakland Dock & Warehouse Company for re-designation of the terminal warehousing, the same re-designation that is referred to in Captain Christmas' letter to National [165] Security Resources Board?

A. No, sir, I do not recall that. I believe I stated that I have no knowledge of the discussions that went on preliminary to changing the Quit Claim Deed.

Q. Well, Admiral, you do recall that the Navy made a recommendation on these modifications to the Munitions Board, do you not?

A. No, I do not.

Q. I'm at—I have some inability to prove that, Your Honor, because these inter-departmental letters are not shown to people who made applications, so I thought maybe the Admiral might remember that. But do you know anything about a recommendation having been made by the Navy to the Munitions Board as to modifications of this Quit Claim Deed?

A. I believe I must have been away on a trip during that period of time, because I do not recall the preliminary discussions to this change in the



(Testimony of Grover C. Klein.)

Quit Claim Deed, and I was somewhat surprised when I saw the file, because had I been there I would have opposed it.

Q. Well, you did see the file?

A. I did see the file, that is correct.

Q. You saw the modifications?

A. I did see the modifications.

Q. And you would have opposed the modifications had you been present? [166]

A. I would have.

Q. Well, what would be the usual course or policy on a matter of this kind from the Munitions Board? It being Navy wouldn't it be referred to the Navy for report? [167]

Q. In the normal procedure you wouldn't act upon it until you received the Navy report, isn't that so?

A. Under normal procedure, yes, sir.

Q. So you would say under normal procedure the Navy finally made the report recommending these modifications, they would not have been included in the modified quit claim deed?

A. That I can't testify to.

Mr. Neblett: That is all from this witness, thank you, Admiral.

(Witness excused.)

RALPH G. DEEDE

recalled as a witness on behalf of the Defendant, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Neblett:

Q. Mr. Deede, does your department, the General Services Administration, execute a deed until—where the National Security Clause is involved and supposed to be involved will you execute a deed at any time until such time as you have received directions from the Department of Defense and Munitions Board as to the terms of that deed?

A. Well, I can't answer your question just like you have stated it.

Q. Well, tell us what you do? Maybe I framed the question rather imperfectly.

A. We are directed to sell certain facilities such as— [168] subject to the National Security Clause, and to obtain that, we get that direction on any particular plant and we do not have to have any further directions from Washington or anyone else to execute the deed.

Q. That helps me. Starting after you have sold a piece of property, such as the Oakland Dock and Warehouse Company, and given a quit claim deed and bill of sale which sets up certain provisions relating to the Security Clause, when that is done you never modify that or change it in any way unless you receive instructions, do you, from the

(Testimony of Ralph G. Deede.)

Department of Defense which comes through your Washington office, is that so?

A. That is correct; we can't modify anything in relation to the National Security Clause.

Q. You are familiar with this modification of that quit claim deed, are you not?

A. Yes, I have seen it. I don't recall everything that is in it, but I have seen it.

Q. You know it is executed by Mr. Bradford, here?      A. That is correct.

Q. Here at 1000 Geary Street about 28 February, 1950?      A. That is correct.

Q. And you do know that Mr. Bradford would never have signed that unless he had received something from the Munitions Board authorizing him to do so, is that so?

A. Well, we had received directions from the Washington office [169] which was in the form of a copy of instructions from the Munitions Board.

Q. Do you have those instructions in your file?

A. Yes, we have them. I don't know whether I have them here with me or not, but we have the copy of the instructions, yes. It was a mimeographed letter.

Q. It was a mimeographed letter telling you what would be put into the deed?

A. That is right.

Q. And you did put exactly what you got from the Munitions Board into the modified deed, is that so?      A. Normally that is true, yes.

(Testimony of Ralph G. Deede.)

Q. I would like to see that if you have it, but I won't delay this matter.

Mr. Neblett: If Mr. Deede has that here I would like to have him produce it.

The Court: Yes, sir, you are entitled to produce it.

A. Do you want me to find it now?

Q. (By Mr. Neblett): Yes, if you would.

A. If you don't mind, if it doesn't matter, I would like to find it afterwards. I have a lot of files here and I don't know whether I will be in a position to put my finger on it.

The Court: Is that all you wanted to ask him?

Mr. Neblett: Yes.

The Court: Why doesn't he step down and find it and you [170] put another witness on?

Mr. Neblett: Very well.

A. Okay.

(Witness excused.)

Mr. Neblett: Mr. Arnaud.

## HENRY J. ARNAUD

a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court?

A. Henry J. Arnaud.

## Direct Examination

By Mr. Neblett:

Q. Mr. Arnaud, what is your position with the Oakland Dock and Warehouse Company?

A. Vice-president and manager of the yard.

Q. And you are also a director of the corporation? A. Correct.

Q. How long have you been vice-president and manager of the yard? A. About four months.

Q. And two or three months before that you were employed by the yard, were you not, employed by the company?

A. No, I wasn't employed until three or four months ago when I became vice—president-manager.

Q. You were in and around a lot in the yard for some months?

A. Oh, yes, I was in constant touch. [171]

Q. When did you come there? You were in Europe for a time. When did you come back from Europe?

A. August 27th, and I was in constant touch from there on.

Q. You were a stockholder in the company?



(Testimony of Henry J. Arnaud.)

A. Correct.

Q. Were you familiar with this modified quit claim deed?      A. Somewhat, yes.

Q. You have read it, haven't you?

A. Yes, sir, I read it.

Q. Have you—has the company any plan for the development of terminal warehouses and so on, in connection with—no, has the company any plans to develop the company in the manner your contract or the quit claim deed gives you the right to develop it by the building of warehouses, refrigeration plants, machine shops, and so forth?

A. Yes, we have given it considerable study and we have prepared a brochure that we are ready to mail out which shows all the facilities and they are all designed around, I would say, warehouse facilities except for the machine shop, for that machine shop and machine shop dock, we have a little different plans for that.

Q. Your plans for the machine shop—what is your plan for the machine shop area?

A. Well, the machine shop and the entire block around it, we call it the machine shop block, which I could show you on the [172] brochure, we are now and have been negotiating with Lyco Company and associates for the last two or three months, a long term lease, and mainly they are in the course of, the ground around that block and neighboring buildings to the machine shop, they want to extend their operation. And they are taking over all the cranes in the building and crane ways and taking

(Testimony of Henry J. Arnaud.)

over the bulk, which they now have under temporary lease, bulk of the machines—I would say practically all the large machinery, and I would say the dollar value that would involve is at least three-quarters of the machinery or more. And the plans are to add two or three times that amount of machinery for their operations.

The Court: What are their operations?

A. Well now, they are manufacturing equipment for the Nordstrom Valve and doing a lot of work for them. In fact, their associates are Nordstrum Valve and Rockwell Industries. It hasn't been definitely negotiated yet. They are manufacturing these big valves shipped mainly to the Far East for the big oil lines. Now they are manufacturing parts for the cyclotron being constructed by the University of California. They use a lot of machinery.

Mr. Neblett: Lyco Company, on machinery, machine works, has a lease? A. Yes.

Q. That is a short term lease? [173]

A. Year's lease, and in that lease the major part of the machinery is involved. We can pick out machinery that they do not have any use for and that they release for us to sell, just the machinery that they consider obsolete for their operation. That is the only machinery we have put on our sales list for sale and have sold.

Q. It is proposed, this proposal you have there is to make a fifteen year lease?

(Testimony of Henry J. Arnaud.)

A. That is right.

Q. To Lyco Company and Associates, and that is a deal for a large block of ground, about how many acres?

A. It includes, I can just about tell you, something like 201 square feet of land and all the buildings, there are on it, which would be the machine shop building, machine side bay, and pipe shop, electric shop, and warehouse three. Those were adjoining buildings. Their plans are to take that over.

Q. Your plans to make a ground lease to Lyco Company that is being negotiated on that ground and buildings, and the machines to them for a fifteen year period?

A. Yes.

Q. And then the negotiation was contemplated, as you said, adding three or four times as much machinery which is already there?

A. Yes. They are using some of the large drills and drill machine valves, and they need, to save time, a larger, multiple [174] drills, and they want—they contacted me last week. They are back in the East now. They contacted me before leaving about throwing in a large gas line because all the gas facilities in the yard were out of commission and can't be renewed. I settled that problem for them.

Q. Mr. Agostini is now in the east, in Washington, for the purpose of meeting these gentlemen?

A. Correct.

Q. Mr. Hardin is one of the mainsprings in the company, the attorney, Mr. Hardin?

(Testimony of Henry J. Arnaud.)

A. He is president of Lyco.

The Court: How do you spell that name?

A. L-y-c-o.

The Court: An eastern company, is it?

A. No, it is a local outfit made up of—I am not qualified to tell exactly the internal setup, but I will give you my information. It is made up mainly of local people. I don't know who the stockholders are, but I know Mark Hardin is president. Mark Hardin, he is an attorney in Oakland. And Fletcher is vice-president—or Lynch is vice-president and Fletcher Secretary-treasurer, I think and Mark Hardin in turn is attorney for Nordstrum Valve, and that is about all I know about that setup. The bulk of their work is Nordstrum Valve work. The picture is a few other things, I don't think I could really bring out. It might interfere with the deal. The picture is developing into a very large picture and we are hoping to make the deal.

Q. (By Mr. Neblett): What have you been informed the effect of this suit and this injunction has on your proposed deal?

A. Mr. Agostini told me that until this is settled nothing can be done. It has just thrown, I would say, a kibosh in the deal.

Q. Who is Agostini?

A. Jules is our President. I am Vice-president.

The Court: Of this company?

A. Of this company, Oakland Dock and Warehouse Company, yes.



(Testimony of Henry J. Arnaud.)

Q. (By Mr. Neblett): What are your plans for development of the rest of the property?

A. Well, we are negotiating on that Oakland ground, about 14 or 18 acres, which has not progressed along to the extent of this deal. We are progressing along a large warehouse facility deal which involves some three hundred thousand feet. Plans, temporarily, temporary drawings have been made on it.

Q. Can you build that warehouse with the crane ways and machinery in the yard as it now is?

A. I have seen houses that are built around oak trees, but I can't visualize a warehouse built around a crane. Well, on those cranes, if I can talk on that, most of the cranes can't be moved. They have settled to the extent that the tracks bulge in the middle; and we are using one now, only one, the one we landed that pier, and the other cranes, those Healy-Tibbetts Company that are laying these big 110 ton sections of pipe out at the estuary on the Oakland Sewer Disposal. When they first leased the facilities they worked in perfect condition, but after running across about one hundred such sections, and they have got a couple of hundred to go, the tracks start sinking in the pier. They first thought it was just a planking across that had deteriorated, and then they dug under that a little ways and timber—there are those sixteen by sixteen timbers and those are in the track and we realize they had to be changed, so we are in the process of changing them, which has been going on for over



(Testimony of Henry J. Arnaud.)

two months and still has roughly another month to go. However, some cases we found those caps that hold the timbers were deteriorated. The reason for it is this, they tell me. I am not qualified to talk intelligently on this. I am just relating what Mr. Healy Tibbetts told me.

Q. You talked to Mr. Healy Tibbetts?

A. Yes. They claimed the biggest difficulty with wharf facilities is this: When they constructed that number one, they put in green timber and they didn't creosote it. Number two they paved, put paving over the timber, over the docks, and probably the reason for that was that it was built there temporarily and they wanted to eliminate the risk of fire. I can't say. That has cracked. The water seeped under that [177] pavement and it is settled. On construction of permanent, they are never paved because the atmosphere absorbs it. That was the reason for that rotting of those timbers, rotted through and some actually broken. They are down there. While we are on that, I found the same condition on the tracks throughout the area.

Q. Are those crane tracks about thirty feet apart?

A. Thirty-two to thirty-five feet.

Q. Thirty-two to thirty-five feet between crane rails?

A. Yes.

Q. Six of them interlacing the property, isn't that right, or eight?

A. There are six crane ways, yes.

Mr. Neblett: I believe that is all. Cross-examine.

(Testimony of Henry J. Arnaud.)

Cross-Examination

By Mr. Peckham:

Q. Mr. Arnaud, isn't it a fact that you have a lease with Lyco Company of the premises that make up the machine shops of the Oakland yard?

A. Will you explain that a little more thoroughly?

Q. You have testified that Lyco Company occupies a certain portion of the premises over there——

A. That is right.

Q. At the Oakland yard? A. Correct.

Q. And I am asking you now, isn't it a fact that you have a [178] lease——

A. A one year lease.

Q. You have a one year lease with Lyco Company? A. Yes.

Q. Isn't it a fact that under the provisions of that lease the Lyco Company—with the Lyco Company, that you can remove the machine tools that are within the machine shops at any time that you sell those machine tools?

A. That is absolutely wrong. I will explain it to you. You go through the shop, and you can check with the Lyco people themselves, you will notice that on some machinery, on most of the machinery there is a red tag called "hold." All that machinery is incorporated under our lease, and this machinery, they have earmarked that. And then we have some shore machinery they have designated

(Testimony of Henry J. Arnaud.)

as taking up room and machinery they didn't need, but the bulk of it is marked for their use, and all the large pieces are marked like the Cincinnati planer and rolling mills and so forth.

Q. There is a considerable portion of the machine tools and machinery and equipment not a part of those Lyco premises that are leased over there, isn't that correct?

A. Well, there is the cranes I have just mentioned.

Q. And there were other small tools?

A. And other small tools.

Q. Referring to the machine tools that Lyco Company has removed [179] there, isn't it a fact they offered to buy those machine tools, just those machine tools they were removing for approximately \$360,000?

A. They haven't made us any offer at all. We haven't got to that point.

Q. Then there aren't any negotiations going on?

A. Yes, on the lease. We have made them a proposition on the lease but they haven't made us any offer on the machine tools.

Q. Isn't it a fact, Mr. Arnaud, that you have authorized—that you have sold and subsequently authorized Lyco Company to deliver machines located there in the premises of Lyco that they were using in production at the time?

A. No, you misunderstand. Here is the procedure we had with them. We only sold tools that they hadn't earmarked for their use, and they had

(Testimony of Henry J. Arnaud.)

nothing to do with the balance of the pieces. Yes, the operation was to maintain them, I will say. However, I haven't been strict with them using some of the tools while they were there because I felt something in use is a lot better than something not in use. But when the tools were sold, the only thing I gave them for their record, which they wanted and I thought they had coming, and we wanted too, to protect ourselves, because I will say I don't qualify as a tools man. I had to depend on them. When I sold a piece I didn't want somebody taking out something belonging to another piece, so at that time I would write a notice to them to the effect that [180] we sold tag number so-and-so to Mr. so-and-so or firm so-and-so and to let them take it, and I had my verbal instructions to be sure they wouldn't take any additional parts that might belong to some other piece of machinery.

Q. Isn't it a fact Lyco Company has objected to the removal of some of the equipment you have authorized to be delivered?

A. They haven't to me, and to my knowledge, to the firm, because they had first opportunity to pick out, and pick out at random whatever they wanted. It was their pieces. I have a list they submitted to me.

Q. Well, under the lease that you have with Lyco Company, Lyco Company—withdraw that question. Under the lease with Lyco Company does Lyco Company have the right to use all the ma-

(Testimony of Henry J. Arnaud.)

chinery or any of the machinery for the one year period?

A. No, they have to take in the lease certain pieces, but, as I said, I told them that other pieces that they are not using, certain pieces once in a while they have temporarily used, so I would let them use it.

Q. Well, in reference to the machinery designated in the lease, did they have the right to use the machinery for a year? A. They do, yes.

Q. And you cannot sell that machinery?

A. That is right. You can't lease a piece of machinery and sell it.

Q. Isn't it a fact in the brochure the Oakland Dock and [181] Warehouse Company has had prepared and circulated, that there is listed an official claim to the entire property that makes up the Oakland Dock and Warehouse yard?

Mr. Neblett: I object to that question on the ground that a brochure is there and we will be glad to produce it.

A. I have it in my brief case.

The Court: I think it is the best evidence.

A. Yes.

The Court: I would like to see it myself.

The Witness: May I go out and get it?

The Court: Yes.

(Thereupon the witness left the witness stand.)



(Testimony of Henry J. Arnaud.)

The Court: And I want to see this amendment to the quit claim deed. I have never seen that.

Mr. Peckham: I believe, your Honor, that is attached to the counter-affidavit of Mr. Agostini.

The Witness (Resuming witness stand): Your Honor, here it is (handing document to the Court).

Q. (By Mr. Peckham): I notice that the pages in the brochure which you have handed me, Mr. Arnaud are not numbered.

A. I think they are.

Q. Oh, yes, I beg your pardon; at the very left hand corner. Referring to page 7 of the brochure——

A. I don't have the copy. Pardon me.

Q. There are pictures shown of the machinery in the machine [182] shop?

A. That is correct.

Q. And doesn't it state——

Mr. Neblett: Pardon me, Counsel. Your Honor please, may I suggest that the brochure should be introduced in evidence before the witness testifies?

Mr. Peckham. Surely. I will introduce it for Identification.

The Court: Let it be marked.

(Brochure was marked Plaintiff's Exhibit 4 for Identification.)

Q. (By Mr. Peckham): Referring to page 7 of Plaintiff's Exhibit 4 for Identification, isn't it stated over the picture of the machines shown on page 7 that, "lathes, drill presses and other modern tool-

(Testimony of Henry J. Arnaud.)

making machines of various sizes and types are listed for sale''?      A. That is correct.

Q. The picture there is a picture of the premises now occupied by Lyco Company?

A. That is correct.

Q. This picture in the corner, lower corner of page 7 on the left, is that a picture of the same facility or is it another?

A. That is correct, the same facility.

Q. That Lyco Company is now leasing?

A. Yes. [183]

The Court: Let me ask you, while it occurs to me, when you bought this from the Government there was an inventory, was there not?

A. Yes.

The Court: Of the machine tools and removable equipment?

A. That is right.

The Court: Now, could you point out on that inventory, or mark off on the inventory, how much of that equipment you proposed to lease to the Lyco Company in this fifteen year lease?

A. I don't know if Counsel has that, but so far as for sale I think I can, I can with Counsel. I can show you a list that we have offered for sale and all that equipment that is earmarked for Lyco here is not on that list. I will say that this brochure was in the process for about two or three months, and now at that time Lyco had earmarked this machinery.

The Court: Lyco is not given any right—it is

(Testimony of Henry J. Arnaud.)

not proposed in this fifteen year lease to give them any right to dispose of any machinery?

A. Naturally not.

The Court: You would have to replace it?

A. We haven't. The only thing, we are in the process on the general facts, price per square foot of the buildings, the terms of the lease and price per square foot of the outfit. We are at that point. I don't know what happened back east. [184] The dealings are being held up until we conclude here. It is unfortunate it had to come up at this very moment. We might have had the lease concluded.

Mr. Peckham: Isn't it a fact, Mr. Arnaud, that Lyco Company—it is only very remote, if any, possibility that Lyco Company intends to enter into a fifteen year lease?

A. I beg to differ with you. If I thought so I wouldn't have spent two months hard work accumulating the facts on that. If they did, I don't see why they are going back east. I don't see why they bring in the other names that I am not permitted to mention now.

Q. With whom did you discuss this proposed lease? With whom of the Lyco Company did you discuss this proposed lease?

A. Mr. Hardin, Mr. Lynch, and back east—well, they left the Friday that you served papers on us.

Q. You discussed it with them on that Friday?

A. That is right, and they were headed back that Saturday, Saturday morning I think they took the plane, and they are very disturbed about our diffi-

(Testimony of Henry J. Arnaud.)

culties here that does interfere with the possibility of making a lease. They had to lay considerable ground work back east.

Q. With the company?

A. No, interested people. I don't know if I am allowed to say. I don't know if it would be good business. If Counsel wants me to mention them, I will. [185]

Mr. Neblett: I didn't hear all of that.

A. Should I mention who they are going back to see?

Mr. Neblett: Just answer the questions, Mr. Arnaud, whatever they are. I will object if they are not proper.

The Court: Unless they are essential I won't require it.

A. It isn't the Government. It is people interested in a lease.

Q. (By Mr. Peckham): Now, Mr. Arnaud, there is located on the premises in the entire yard of the Oakland company considerable more machine tools than those that have been designated by Lyco Company to become part of the machinery that they would lease for fifteen years, isn't that correct?

A. I don't get your question clearly.

The Court: I didn't hear the answer.

A. I don't get the question clearly.

Mr. Peckham: Would you read the question, Mr. Reporter?

(Question read by the Reporter.)

(Testimony of Henry J. Arnaud.)

A. No, all they are entertaining in their deal now is the machines that they have within the premises they now occupy, all the bridge cranes and the bigger of the tools they have.

Q. You say the tool?

A. No, tools, which I said was the bulk of the machine shop.

Q. Bulk of the machine shop? A. Yes.

Q. Aren't there located on the premises in Oakland considerable [186] more machine tools and equipment that are not in the machine shop?

A. Cranes, mainly, is the biggest I can think of right now.

Q. There are other machine tools, aren't there?

A. No, except in the building appurtenant to these buildings we are taking over there are cranes that they are interested in and there is one lathe, I think, in one of the neighboring buildings—one lathe.

Q. Mr. Arnaud, you have plans to take down those cranes, do you not? A. No, we don't.

Q. Haven't you taken down one?

A. The Wurley crane is one.

Q. What is going to happen to that?

A. We sold that.

Q. It hasn't been delivered?

A. Yes. I will say it has been sold, paid for and delivered by the General Service.

Q. You found there——

The Court: What were the tools you sold the Moore Shipbuilding Company?



(Testimony of Henry J. Arnaud.)

A. We sold them some of the equipment not designated by Lyco for their use. If I remember right it involved a Blanchard—we have those records here—involved a Blanchard grinder, I think that they are—I forget the designation of the three [187] pieces but they are in the record. Counsel has a record here.

Q. (By Mr. Peckham): You are not prepared at this time, are you, Mr. Arnaud, to enumerate the specific machine tools that Lyco Company has designated?

A. No, but they have submitted a list to us.

Q. And that list is just a part of the negotiations, isn't that correct?

A. May I check my brief case? Sometimes I do carry things like that around. I have a list.

Mr. Peckham: Your Honor, if Counsel has no objection at this time I would move this be marked and admitted in Evidence.

The Court: Yes. I think he asked it be marked, too.

Mr. Peckham: For Evidence, not Identification.

(Document was marked Defendant's Exhibit O in Evidence.)

Q. (By Mr. Peckham): The list that has been proposed of machinery included in the *least* is just a list submitted for proposing the negotiations, isn't that correct?

A. The belief that they have what is included in that lease.

(Testimony of Henry J. Arnaud.)

Q. No, there are additional pieces they are taking over on the permanent *least*?

A. That is just the one year lease.

Q. Do you have a copy of the lease, Mr. Neblett, that the Lyco Company is presently holding the *premises of the premises*?

Mr. Neblett: Counsel, I don't have that, but I do have a copy of a list that was sent to me by Mr. Hardin in [188] Washington and I redrew it and made some changes in it. That is all I have. I don't know whether the witness has the Lyco lease with him here today. [188-A]

The Witness: No, I don't have it.

Mr. Peckham: I was interested in the provisions relating to machinery.

A. The lease that you read is the lease that you signed, that I haven't signed so if that is——

The Court: I would like to see a list of the machinery that is going to the Lyco under the proposed lease.

Mr. Neblett: The proposed lease, your Honor, that has not yet been fixed upon, the terms are not yet completely agreed upon.

The Witness: Slightly mixed up now.

The Court: Well, we could have a list of the property that is not heretofore leased, not under the lease to Lyco now. Would that be difficult to get?

The Witness: Well, we have that——

The Court: And also a list of that which has already been sold.

(Testimony of Henry J. Arnaud.)

Mr. Neblett: The list of property already sold appears under releases of the chattel mortgages. But that is described largely by folder numbers which is the description on the chattel mortgage.

The Court: Yes.

Mr. Neblett: The War Assets, the General Services has a complete list of everything that has been sold, of course. We have to go to their files to get it. [189]

Mr. Peckham: Perhaps, your Honor, we could have Counsel—Counsel and I could work out that with Mr. Deede by referring back to the folders and take it down, specific possession, and make a list. Perhaps we can stipulate to, agree to a statement of fact as to that matter.

The Court: You see, in this chattel mortgage—I mean, the bill of sale, the provision in here to the effect that they will not sell or dispose of any of the machines, tools or other things, the loss of which would materially reduce the capacity of the plant to produce the items for which it is designed. Now, I have no—I can't tell what has been removed, sold, whether it is essential or not.

Mr. Neblett: If your Honor please, that question—I don't know how to meet that question, except in argument. We propose to meet that question by showing that the modified quit claim deed took out all reservations of the dormant estate of the personal property and if that quit claim deed had been plead in the Complaint, it could have no cause of action stated. That is the point in the case.

(Testimony of Henry J. Arnaud.)

Of course, I don't waive any other points we have made. We think it is invalid anyway, but the transaction which was made with the Government was made with its eyes open and now, instead of our breaching our agreement, the Government is breaching the agreement which it made with us on February 28.

The Court: Leaving that aside, I have heard enough on that, but here is the situation that the Government charges [190] that you're selling property, going to sell a lot of this equipment which was mentioned in this bill of sale. The restriction on the sale is limited to that which will reduce the capacity of the plant to produce the items for which it was designed.

Now, for instance, a man might go sell an obsolete turret lathe that wouldn't reduce the capacity a bit. But on the other hand to sell these cranes might reduce the capacity considerably, but whether these sales reduce the capacity or not, I don't know.

Counsel, the witnesses yesterday said, of course, it would take a great deal of time to rehabilitate this plant in the event these machine tools were sold, but they didn't say, I think they are probably right, I think there is a lag in the machine tool market, but doesn't reach the question of whether, what has been done or is contemplated, is going to reduce the capacity of the plant.

Mr. Peckham: Your Honor, I have a partial list of the specific pieces of machine tools that have been sold to the Moore Dry Dock Company. This



(Testimony of Henry J. Arnaud.)

purports only to be a partial list, just one seller, Mr. Arnaud will admit they sold a turret lathe.

The Court: Not passing on the question you just touched your finger on here, whether or not the provisions of the amended deed, quit claim deed read together with this bill of [191] sale changed the terms of the bill of sale. I am not discussing that now, just trying to get what the facts are.

Mr. Neblett: Your Honor please, on this question of the machine tools and machinery just sold, we have given to Mr. Rawleigh, the representative of the Navy, who called upon us, a list of these machines. The way they are described in the chattel mortgage, the way they were discussed in the leases, by folder numbers, and they are available at the War Assets. We don't have these folder numbers. That, I think that Counsel could produce that very easily by asking the War Assets to bring down that list. Now, we do have the inventory of the entire property, which we could go through and it would take a long time to get it all.

The Court: Of course, they could produce the list of what you propose to sell. You sold some things. They can't produce a list of that, perhaps, but what you propose to sell, you will have to produce yourselves and what you propose to lease to Lyco, and I think there should be some testimony here in regard to, if that is—in regard to whether or not those things that are sold and proposed to be sold will deplete—what is the language?



(Testimony of Henry J. Arnaud.)

Mr. Peckham: Materially reduce.

The Court: Reduce the capacity to produce. I think it is somewhat incumbent upon both parties to give me an idea. I wouldn't want to enter an injunction in this case just [192] because you proposed to sell something obsolete, worn out material, that wouldn't reduce this thing.

On the other hand, if I felt that the conditions required, I might enter, entertain giving an injunction, if the place was going to be stripped, unless I had no right to, you see. But that seems to me to be quite a vital point in the consideration of this matter.

Mr. Peckham: Well, your Honor, we could, from our view point, as far as furnishing a list is concerned, would be to translate the folder numbers on the releases of the chattel mortgage that we assume, though we don't actually have actual knowledge, we assume have been sold, and get specific descriptions and compile that list. Of course, as far as we can attempt to introduce further testimony, that once that list is determined, from the Admiral and perhaps other representatives as to how that would affect the capacity of the plant to produce, I think that could be done rather quickly, but it would take a little time, not too much time, to compile that list.

Mr. Neblett: May I make a suggestion, your Honor? I just spoke to Mr. Horton, who is the associate with Lester, Herrick & Herrick, who are

(Testimony of Henry J. Arnaud.)

now making an audit of the books of the concern. The audit has been brought down to May 31st of this year. The audit is about completed. Mr. Horton has a list, item by item of everything sold and everything left [193] in the yard. It isn't here, it is in his office. Mr. Horton, where is it?

Mr. Horton: I have a list of the property sold in my office.

Mr. Neblett: At your office?

Mr. Horton: My office.

The Court: Could you bring it back at 2:00 o'clock?

Mr. Neblett: Very well.

The Court: Well, proceed. Excuse the interruption.

Mr. Neblett: This, your Honor, I have in my hands the inventory furnished by the War Assets Administration. You can see what a voluminous document it is.

The Court: You wouldn't contend, Mr. Peckham, would you, that that if they are allowed to lease, to make a lease to Lyco, as long as it doesn't include the disposal or allow Lyco to dispose of it——

Mr. Peckham: I haven't read over the Security Clause provisions with the thought in mind of whether a lease or the leasing——

The Court: Any lease that they make.

Mr. Peckham: Would have to include the same terms?

The Court: Would be subject to the——

Mr. Peckham: Yes.

(Testimony of Henry J. Arnaud.)

The Court: —terms of the bill of sale—

Mr. Peckham: Yes. [194]

The Court: —whatever they may be modified by the amended deed, subject to that modification.

Mr. Peckham: Yes.

The Court: I wouldn't want to restrain these people if they were just—from making a lease with Lyco if that is not going to—if it consists of disposal or violates any Government policy, Lyco can operate and turn the things over to the Government when they want it in case of an emergency, just as well as these people.

Mr. Peckham: I think we can produce considerable evidence on that prospective lease that will put a different light on the picture.

Mr. Neblett: It doesn't appear on the records, your Honor, that Lyco had been in the property under the lease to War Assets Administration, from War Assets Administration for a year or two before this company bought it, and when Lyco went in the Government assigned that lease to us when we bought it. The Government assigned that lease to us. They were already there. We were inheriting them as a tenant.

Mr. Peckham: Of course, the situation as it actually stands at this moment is there is no lease with Lyco Company on a long term proposition.

The Court: That is right, that is a temporary lease.

Mr. Peckham: But there has been a great deal of machinery sold out of that shop. We can show

(Testimony of Henry J. Arnaud.)

that Lyco Company—well, [195] I would rather wait to produce that testimony.

The Court: Yes.

Mr. Peckham: I think in view of your Honor's statements that such a list of the property should be compiled by us and should produce further evidence on the question of the sale of that machinery, the sale of prospective machinery, would affect the capacity of the plant to produce——

The Court: Well, let Mr. Neblett go on with his case, now. You finished?

Mr. Neblett: Just one more question.

Q. Does that brochure which has just been introduced in Evidence, does that give the plan of the Company for the development of the property under the modified quit claim deed?

A. Yes, it does.

Q. And that brochure is intended to be, it is an advertisement to the public for the purpose of encouraging——

A. That is right, because you see there is possible one proposed building on an area that under the new quit claim deed we can build and where the Government, for instance, would have to, if they took over, they would have to tear it down and rehabilitate it, and paying us a fair value during the time that they are occupying the premises, paying us something for damages and work in progress and a few other things. That is all designed around that proposition, wasn't started until the new quit claim—yes, it had been started before, but it [196]

(Testimony of Henry J. Arnaud.)

wasn't finished, it was kept in abeyance until this new quit claim deed was made of record.

The Court: Briefly, what is that quit claim deed, what is contemplated under that quit claim deed, putting a warehouse in there?

The Witness: On that particular problem, on the legal problem, it wouldn't be possible——

The Court: You don't know that?

The Witness: No.

The Court: What do you contemplate doing you say comes under the quit claim deed, the amended quit claim deed?

The Witness: Well, for instance under the old deed, if I remember the terms, you couldn't bring in a tenant and tell them, here, we will lease you this property good for fifteen years, build a building for you or you build a building, and where the old lease, come in for a short time—now, the quit claim deed gives absolute right to anything we want on the premises, practically. That is the way I see it. Build a ten story building out on that open ground, we don't have to ask anybody for any permission, and in case of an emergency, that the Government comes in and takes over. If they don't want those premises, that building we built on that property, they are to tear it down and rebuild it. After and during that time they are to pay us a fair market value for the improvements we have plus the loss of work in progress. The [197] way I look at it, I look at it this way: Suppose we didn't have any Security Clause on the property itself. We would



(Testimony of Henry J. Arnaud.)

be then in the same light as the Contra Costa—I mean the San Francisco, the big laundry, the United States Laundry here in San Francisco, an office building or a hotel building, if the Government wants under the eminent domain, they can take it over anyway, so we feel the quit claim deed now practically gives the same proposition, offer them to the tenant. They are practically the same regulations as under the eminent domain; in case of war the Government could have it, they are going to have it.

The Court: They are protected.

The Witness: They are protected. And can't be thrown out of here.

The Court: The United States can always condemn anything.

The Witness: That is right.

### Recross-Examination

By Mr. Peckham:

Q. Were you with this company at the time this land was acquired by the Oakland Dock and Warehouse Company?      A. Correct.

Q. That was in June, 1949?      A. Yes.

Q. And you knew that both the personal property and the real property were subject to the National Security Clause?

A. I will say this, Counsel: I will say that I left on June [198] first and all of the papers were transacted after that, and I was away three months.

(Testimony of Henry J. Arnaud.)

Q. Did you ever hear in any of the discussions concerning the purchase of that property about the National Security Clause?      A. Yes.

Q. Did you understand the main effect and implications that that clause would be imposing upon that property?

A. Well, I certainly—I must have a different version on it than you have.

Q. You knew——

A. I knew that we couldn't do exactly what we wanted to, but I never did think we would be restricted to the extent you think we are.

The Court: Well, gentlemen, the Grand Jury is waiting to report here. It is 12:00 o'clock now. I have an appointment, luncheon appointment, and it might be a little late. Suppose we adjourn this hearing until 2:30.

Mr. Peckham: Very well, your Honor.

(Thereupon an adjournment was had until 2:30 o'clock p.m. of the same day.) [199]

Wednesday, June 21, 1950—2:30 o'Clock p.m.

HENRY J. ARNAUD

having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Neblett: If the Court please, at the recess this morning the question arose as to the lease between the Lyco Machine Company and the Oakland Dock and Warehouse Company, of the machine

(Testimony of Henry J. Arnaud.)

shop. I have the original copy of the lease which I will make available to Counsel.

The Court: That is the one year lease?

Mr. Neblett: Yes, your Honor. That is the lease that succeeded to the lease for one year which Lyco had for some years, I don't remember just how long.

The Court: I don't think it appears in the testimony or the record, but Mr. Neblett indicated this morning that at the time you got this property, you bought it with the existing lease to Lyco?

The Witness: With the Government.

The Court: Of the machinery?

A. That is right.

The Court: And the lease, this lease that has been offered in evidence, is a renewal of that lease?

A. Yes. That expired in April.

Mr. Neblett: There are some other, different terms, [200] your Honor.

The Court: What?

Mr. Neblett: There are some different terms, increased rental and some other features.

The Court: However, it is in a sense an extension of the former lease?

Mr. Neblett: Yes.

A. And the permanent lease now to which the negotiations——

Mr. Peckham: I won't try to read it now, your Honor.

The Court: Will the witness identify it as the temporary lease then so we will have it in the record correctly?

(Testimony of Henry J. Arnaud.)

Recross-Examination

(Continued)

By Mr. Peckham:

Q. I show you a document entitled "Agreement of Lease," dated May 1, 1950, between Oakland Dock and Warehouse Company, as lessor, and Lyco Machine Works as lessee, and will ask you if you identify this document?

A. Yes, that is the temporary lease. I recognize all signatures on it.

Q. You recognize the signatures of Jules J. Agostini, Jr.;—

Mr. Neblett: May I ask Counsel and the witness to raise their voices? I have great difficulty in hearing either of them.

Q. (By Mr. Peckham): You recognize the signature of Mr. Agostini and Mrs. Morgan as President and Secretary, respectively, of the lessor company, and Laurence Fletcher as Secretary [201] of the lessee? A. I don't recognize—

Mr. Neblett: We will stipulate these are their signatures.

A. I recognize Mark Hardin's signature.

Mr. Peckham: At this time do you wish to offer it in *office*, Mr. Neblett?

Mr. Neblett: No, that is the only copy we have. If you desire to offer it in evidence we are perfectly willing to let you do so.

The Court: Can't you do this, offer it in Evi-

(Testimony of Henry J. Arnaud.)

dence but don't mark it, and then replace it with a photostatic copy or just a typewritten copy?

Mr. Neblett: May I suggest, your Honor, that it be received in Evidence but not marked and that the Reporter copy it in full in the transcript?

The Court: All right, just the same thing.

Mr. Neblett: And the Reporter can return this lease to us when it has been fully copied with our daily copy of the transcript.

The Court: Yes.

Mr. Peckham: Yes.

Defendant's Exhibit next in order?

The Court: It is your exhibit.

Mr. Neblett: Very well, your Honor. [202]

### Agreement of Lease

This Lease made and entered into this 1st day of May, 1950, between Oakland Dock and Warehouse Co., a corporation organized and existing under the laws of the State of California, hereinafter called Lessor, and Lyco Machine Works, a corporation organized and existing under the laws of the State of California, hereinafter called Lessee:

### Witnesseth

Lessor hereby leases to Lessee, and Lessee does hereby hire from Lessor, a certain building known and described as Building No. 59, otherwise known as the Machine Shop, which building is located on the property of Lessor, formerly known as Moore Drydock Company, West Yard, Oakland, California,



(Testimony of Henry J. Arnaud.)

together with certain machinery, tools and equipment contained therein and the appurtenances to the machinery, tools and equipment, which machinery, tools and equipment are more particularly described as follows, to wit:

- 1 Oliver Drill Pointer
- 1 Willeys Grinder for Carbide
- 1 Cincinnati Cutter Grinder
- 1 Morton 18" Surface Grinder with AC-DC motor for magnetic check
- 1 Mitts and Merrill Key Seater—small
- 3 Pedestal Grinder [203]
- 1 Racine Hydraulic Shear Cut Saw
- 2 Racine Oil Cut Saw
- 1 Carlton 8' Radial Drill Press
- 1 Carlton 6' Radial Drill Press
- 1 Cincinnati 3' Radial Drill
- 1 Canedy Otto 21" Drill Press
- 1 Canedy Otto Bench Drill Press
- 1 Hydraulic 75-ton Press
- 1 Fameo Arbor Press
- 1 Electric Welding Machine
- 2 Bullard Vertical Turret Lathe
- 60" King Boring Mill
- 72" King Boring Mill
- B. & L. Horizontal Boring Mill
- 5" Spindle Table Model
- Lucas Horizontal Boring Mill
- G. & L. Horizontal Floor Mill 6" Spindle
- 1 48" LeBlond Lathe

(Testimony of Henry J. Arnaud.)

- 2 36" Niles Lathes
- 2 Monarch 20" Lathes
- 1 American 20" Lathe
- 1 Monarch 16" Toll Room Lathe
- 1 G. & E. 20" Shaper
- 1 Smith and Mills 25" Shaper
- 2 Cincinnati #4 Universal Milling Machines  
with attachments
- 1 Cincinnati Hypor Planer—Open Side

This Lease is made upon the following terms and conditions:

1. The term of this lease shall be a period of one year, commencing on the 1st day of May, 1950, and ending on the 30th day of April, 1951; provided, however, that this lease shall be cancellable upon a four months' notice of cancellation in writing given by either party to the other prior to the commencement of any monthly term thereof.

2. Lessee shall pay to Lessor as rental for the above-described building, machinery, tools and equipment, the sum of \$1,850.00 per month and, in addition thereto, the sum of \$20.00 per month for water furnished said building, both sums to be in lawful money of the United States of America, as follows: \$1,870.00 on and in consideration of the execution hereof, receipt of which is hereby acknowledged, and \$1,870.00 on the 1st day of June, 1950, and \$1,870.00 on the 1st day of each and every month thereafter during the existence of this lease.

(Testimony of Henry J. Arnaud.)

3. Lessee agrees to pay said rental at the time, in the amount and manner herein provided and to do, perform and meet each and every covenant, condition and obligation contained herein. [205]

4. If Lessee holds possession hereunder after the expiration of the term of this lease with consent of Lessor, Lessee shall become a tenant from month to month at the monthly rental of \$1,870.00, payable in advance, on the 1st day of each and every month, and upon all of the terms and conditions herein specified.

5. Lessor and the agents and employees of Lessor shall have the right to enter in and upon said building at all reasonable times to inspect the same in order to see that no damage has been, or is being done to the leased property, and to protect any and all rights of Lessor and to post such reasonable notices as Lessor may desire to protect the rights of the Lessor; and Lessor shall have free access to the building for the purpose of showing, removing or otherwise disposing of the machinery, tools and equipment on the premises not specifically leased herein, and for the further purpose of showing the leased property.

6. Lessee accepts the building as it is now and agrees that the building is now in tenantable and good condition and that Lessee shall, at Lessee's cost, keep said building both inside and out in good condition and repair during the term, and that the building shall not be altered, repaired or changed

(Testimony of Henry J. Arnaud.)

without the prior written consent of Lessor. Lessee agrees at the expiration [206] of the term of this lease, or upon the earlier termination thereof for any reason, to quit and surrender said building in good condition and repair, reasonable wear and tear and damage by acts of God or fire excepted. Lessee hereby waives the provisions of Sections 1941 and 1942 of the Civil Code of the State of California and any and all other statutes or laws permitting a tenant to make repairs at the expense of a landlord or to terminate a lease by reason of the condition of the building.

Lessee also accepts the machinery, tools and equipment leased herein in the condition in which they are and each of them is; and Lessee agrees that it has inspected all of them and that they are all in good working order and condition.

7. Lessee shall not assign this lease, nor any right hereunder nor sublet the building, machinery, tools and equipment, nor any part thereof, without the prior written consent of Lessor. No consent to any assignment of this lease, or any subletting of said property, shall constitute a waiver or discharge of the provisions of this paragraph, except as to the specific instance covered thereby; nor shall this lease or any interest therein be assignable by action of law including bankruptcy, both involuntary and voluntary, and no Trustee, Sheriff, [207] Creditor or Purchaser at any judicial sale or any officer of any Court acquire any right under this lease, or to

(Testimony of Henry J. Arnaud.)

the possession or use of the premises, or any part thereof, without the prior written consent of Lessor. Any violation of the terms of this paragraph shall, at the option of Lessor, be deemed a breach of this lease.

8. Lessee agrees that if Lessor is involuntarily made a part defendant to any litigation concerning this lease, or the leased property or any part thereof, by reason of any act or omission of Lessee and not because of any act or omission of Lessor, then Lessee shall hold harmless the Lessor from all liability by reason thereof including reasonable attorneys' fees incurred by Lessor in such litigation and all taxable court costs and, in case Lessor brings an action against Lessee to enforce any of the terms hereof, or commences a summary action under the Unlawful Detainer Act of the State of California for the forfeiture of this lease and the possession of said property, or any of them, and Lessor shall prevail in such action, Lessee agrees to pay to Lessor such attorneys' fees and expenses as the Court may deem reasonable, and the right to such attorneys' fees and expenses shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment and, if prosecuted to judgment, [208] such fees shall be included in said judgment.

This lease is made upon the express condition that if default be made in the payment of the rent above



(Testimony of Henry J. Arnaud.)

reserved, or any part thereof, or if Lessee fails or neglects to perform, meet or observe any of Lessee's obligations hereunder, or if Lessee shall abandon or vacate said property, Lessor, or the legal representative of Lessor, at any time thereafter may, in the event such default is not remedied by Lessee within thirty (30) days after notice in writing from Lessor, lawfully declare said term ended and re-enter said leased property, or any part thereof, either with or without process of law, and expel, remove and put out Lessee or any person or persons occupying said property, and may remove all personal property therefrom, using such force as may be necessary to repossess again and enjoy said property as it did before this lease, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant or condition, and without liability to any person for damages sustained by reason of such removal.

Lessor may likewise at Lessor's option and in addition to any other remedies which Lessor may have upon such default, failure or neglect and upon entry therefor repair, alter and change the leased property as Lessor may deem fit and let the property, or any part thereof, [209] from time to time at any rental and on any terms and for any part or all of the balance of the term hereof that Lessor may deem desirable in Lessor's discretion; and Lessor may in said letting also let the said property for a period extending beyond the expiration of the term hereof, which shall not prejudice or invalidate any

(Testimony of Henry J. Arnaud.)

of Lessor's rights in this lease reserved, but the period beyond the term hereof shall in no event be for the installments of rent and other sums falling due hereunder for the period or periods after entry during which the property remains idle, which sums shall be payable as they become due hereunder; (b) for all expenses, including commission, which may be incurred by Lessor from time to time during the term hereof for reletting said property, which expenses shall be payable as they are incurred; and (c) while said property is subject to any lease or leases made by Lessor pursuant to this paragraph, for the amounts by which the monthly installments payable under such new lease or leases is less than the monthly installments of rent payable hereunder, which deficiency shall be payable monthly as the same is determined. If the Lessor, either before or after such entry, elects to exercise the right given it by the next [210] succeeding paragraph to accelerate the unpaid amount of rent, it shall at any time after such entry have the election to recover in lieu of the amounts which would thereafter be payable under the preceding sentence of this paragraph, the amount by which the rental value of the portion of said term unexpired at the time of such election is less than the entire amount of unpaid rent payable hereunder for said unexpired portion of said term, which deficiency and any expenses, including commissions, incurred by Lessor in leasing the said

(Testimony of Henry J. Arnaud.)

premises shall be due to and recoverable by the Lessor at the time it exercises the said election notwithstanding that the full term hereof shall not have expired; and if the Lessor after such entry leases said property, then the rent payable under such lease shall be conclusive evidence of the rental value of the said unexpired portion of the said term.

Lessor may likewise at Lessor's option and in addition to any other remedies which Lessor may have upon such default, failure or neglect, give to Lessee written notice of such default, failure or neglect and advise Lessee thereby that, unless all the terms covenants and conditions of this lease are fully complied with within thirty (30) days after the giving of said notice, the entire amount of rent herein reserved or agreed [211] to be paid and then remaining unpaid shall immediately become due and payable upon the expiration of said thirty (30) days and, unless all the terms, covenants and conditions of this lease are fully complied with by Lessee within said thirty (30) days, the whole of said rent shall immediately become due and payable upon the expiration of said thirty (30) days without further notice to Lessee.

9. The subsequent acceptance of rent hereunder by Lessor shall not be deemed a waiver of any preceding breach or any obligation hereunder by Lessee other than the failure to pay the particular rental so accepted: and the waiver of any breach of any

(Testimony of Henry J. Arnaud.)

covenant or condition by Lessor shall not constitute a waiver of any other breach regardless of knowledge thereof.

10. Lessee agrees to pay for all fuel, gas, oil, heat, electricity, power, materials and services which may be furnished to or used in or about said property during the term of this lease and to keep the same free and clear of any lien or encumbrance of any kind whatsoever created by Lessee's acts or omissions.

11. Any notice, demand or communication under or in connection with this lease may be served upon Lessor by personal service, or by mailing the same by Registered Mail in the United States Post Office, postage prepaid [212] thereon, and directed to Lessor at Latham Square Building, Oakland, California, and may likewise be served on Lessee by personal service or by so mailing the same addressed to Lessee at 925 Central Bank Building, Oakland, California. Either party hereto may change such address by notifying the other party in writing as to such new address as Lessee or Lessor may desire used and which shall continue as the address until further written notice.

12. If the building in which the herein leased property is situate shall be damaged or destroyed by fire, the Lessee shall give immediate notice thereof to the Lessor and the Lessor shall forthwith repair the same, provided such repairs can be made within thirty (30) days by working in the usual and



(Testimony of Henry J. Arnaud.)

ordinary manner and under the laws and regulations of State, County or Municipal authorities, but such destruction or damage shall in nowise annul or void this lease, except that the Lessee shall be entitled to a proportionate deduction of rent while such repairs are being made, such proportionate deduction to be based upon the extent to which the making of such repairs shall interfere with the business carried on by Lessee on said property. If such repairs cannot be made in said manner in thirty (30) days, the Lessor may, at his option, make same [213] within a reasonable time, this lease continuing in full force and effect, but the Lessee shall be entitled to a proportionate deduction of rent while such repairs are being made as hereinabove provided. In the event that the Lessor does not so elect to make such repairs which cannot be made in said manner in thirty (30) days, or such repairs cannot be made under such laws and regulations this lease may be terminated at the option of either party.

13. The exercise of any right or option or privilege hereunder by Lessor shall not exclude Lessor from exercising any and all other rights, privileges and options hereunder and Lessor's failure to exercise any right, option or privilege hereunder shall not be deemed a waiver of said right, option or privilege nor shall it relieve Lessee from Lessee's obligation to perform each and every covenant and condition on Lessee's part to be performed hereunder nor from damages or other remedy for failure to perform or meet the obligations of this lease.



(Testimony of Henry J. Arnaud.)

14. The covenants and agreements contained in this lease shall be binding upon the parties hereto and upon their respective heirs, executors, administrators, successors and assigns.

15. Time is of the essence of this lease and of each and every of the provisions herein contained.

16. If any part of the leased property shall be taken or condemned for a public or quasi-public use, and a part thereof remains which is susceptible of occupation hereunder this lease shall, as to the part so taken, terminate as of the date title shall vest in the condemnor and the rent payable hereunder shall be adjusted so that the Lessee shall be required to pay for the remainder of the term only such portion of such rent as the value of the part remaining after taking or condemnation bears to the value of the entire property at the date of taking or condemnation; but in such event, Lessor shall have the option to terminate this lease as of the date when title to the part so condemned vests in the condemnor. If all of the leased property or such part thereof be taken or condemned so that there does not remain a portion susceptible for occupation hereunder, this lease shall thereupon terminate. If a part or all of the leased property be taken or condemned, all compensation awarded upon such condemnation or taking shall go to the Lessor and the Lessee shall have no claim thereto, and the Lessee hereby irrevocably assigns and transfers to the Lessor any right to compensation or damages to which

(Testimony of Henry J. Arnaud.)

the Lessee may become entitled during the term hereof by reason of the condemnation of all or a part of the leased property. [215]

17. Lessee shall have the right to install such of its own machinery and equipment upon the herein leased property as may be necessary for its operations and to remove same at the end of the term hereof, provided, however, that following such removal the Lessee shall, at the option of Lessor, at its sole expense, restore the properties leased to the same condition as when they were delivered to Lessee pursuant to this lease.

18. Lessee shall use expert care in the occupation, use and operation of the building, equipment and machinery embraced in this lease and shall at all times during the term of this lease keep and maintain the same in a good state of repair, and shall, at Lessee's expense, make all repairs and perform all maintenance necessary to keep the building, equipment and machinery at all times in good condition as at the beginning of the term of this lease. Such necessary maintenance shall include the greasing, oiling, and turning over of all heavy equipment in the Machine Shop, not specifically leased by Lessee but which is situated in said building, at least once every two weeks in order that such heavy equipment may be maintained in good operating condition. Upon the expiration or termination of this lease, Lessee shall forthwith yield and place Lessor in peaceful possession of the building, equip-

(Testimony of Henry J. Arnaud.)

ment and machinery embraced in this lease, free and clear of any liens, claims or encumbrances and in as [216] good condition as said building, equipment and machinery existed at the commencement of this lease, ordinary wear and tear excepted.

19. During the term of this lease, Lessor will procure and maintain, at the cost of the Lessee, Insurance on the equipment and machinery embraced in this lease against fire, windstorm and such other hazards in such companies and in such amounts as shall be mutually agreed upon between Lessor and Lessee; but the amount of such insurance shall not be less than \$368,000.00. The policies evidencing such insurance shall be made payable to Oakland Dock and Warehouse Co. The premiums shall be paid by Lessor and the Lessee shall reimburse Lessor within thirty days from the date Lessor renders a statement to Lessee of the amount of the premiums. In the event of partial loss payable under any of the policies, the proceeds shall be applied by Lessor to the repair, restoration or replacement of the property as damaged or destroyed; provided, however, that in the event it is determined that the cost of repair, restoration or replacement will exceed the amount of the insurance proceeds Lessor may elect whether or not to apply such proceeds as aforesaid. Any property acquired in replacement of the property damaged or destroyed shall be the property of Lessor and shall thereupon be subject to all the terms [217] and provisions of this lease. In the

(Testimony of Henry J. Arnaud.)

event Lessor determines that the cost of repairs, restoration or replacement of a partial loss will exceed the amount of insurance proceeds, or the equipment and machinery are so damaged or destroyed as to render said property totally unusable by Lessee, and Lessor does not elect to apply the insurance proceeds to the repair, restoration or replacement thereof, as above set forth, Lessor will so advise Lessee in writing and this lease may thereafter be terminated by either party upon thirty (30) days' written notice to the other party.

Lessee also agrees to save Lessor harmless against any liability whatsoever because of accident or injury to persons or property occurring in the use or operation of the building, equipment and machinery embraced in this lease. Lessee further agrees that during the term of this lease it will procure and maintain at its cost public liability insurance and property damage insurance in such amounts and with such companies as Lessor shall approve or require. The policies evidencing such insurance shall be made payable to the Oakland Dock and Warehouse Co. for the account of all interests and such policies or copies thereof shall be delivered to Lessor.

20. In the conduct of its operations upon the property embraced in this lease, Lessee agrees to comply [218] with all applicable Federal, State, Municipal and Local Laws, and the rules, orders regulations and requirements of any commissions,



(Testimony of Henry J. Arnaud.)

departments and bureaus, and all local ordinances and regulations; and further agrees to indemnify and hold Lessor harmless from any liability or penalty which may be imposed by Federal, State, Municipal or Local Authority, or any commission, department or bureau thereof by reason of any asserted violation by Lessee of such laws, rules, orders, ordinances, regulations or requirements; provided, however, that nothing herein contained shall prohibit Lessee from contesting in good faith the validity of any such laws, rules, orders, ordinances or regulations.

21. It is agreed between the Lessor and the Lessee that this lease terminates and cancels as of May 1, 1950, all other leases and contracts between Lessor and Lessee on Building No. 59 and on any or all of the machinery, tools and equipment therein, and that any subsequent modification of the terms or conditions of this lease shall be void unless reduced to writing and signed by both parties hereto. The Lessee shall have the normal rights of ingress and egress to the leased property over the rail and street connections therewith which lie on Lessor's property, but there shall be no obligation upon the part of Lessor to keep said railroad and street [219] connections in repair.

In Witness Whereof, the said parties hereto have subscribed their names and affixed their seals, in



(Testimony of Henry J. Arnaud.)

duplicate, the day and year first hereinabove written.

OAKLAND DOCK AND

WAREHOUSE CO.,

A California Corporation,

By /s/ JULES J. AGOSTINI, JR.,

President.

Attest:

By /s/ A. HANFORD MORGAN,

Secretary.

Lessor.

LYCO MACHINE WORKS,

A California Corporation,

By /s/ J. M. HARDIN,

President.

Attest:

By /s/ LAURENCE S. FLETCHER,

Secretary,

Lessee.

Q. By Mr. Peckham: Mr. Arnaud——

Well, first I will show Counsel this document.

Mr. Neblett: What is it, Mr. Peckham, if I may ask?

Mr. Peckham: I understand this is a circular that was circulated among prospective purchasers of machine tools showing [220] a list of the machine tools at the Oakland Dock and Warehouse Company that it stated to be for sale.

A. I recognize that.

(Testimony of Henry J. Arnaud.)

Mr. Neblett: I don't recognize it, but if the witness can identify it.      A. Yes.

Q. (By Mr. Peckham): I show you a document, multigraphed pages, several multigraphed pages, and ask you if you can identify that document?

A. Yes, we have that. I set this up and, in fact, we have printed forms of this type. We were making that out and we started to mimeograph it, about the first seventy-five to one hundred, and we have printed forms. This is the list of machinery excluding the machinery that is earmarked for Lyco that we offered for sale, and I didn't do this until Counsel, Colonel Neblett, advised me that I had a right to sell everything on the yard according to the quit claim deed, and this was done subsequent to that. He advised me I had a right to sell everything in the yard. However, the Lyco Machine Tools, that was at that time, told me that lease is excluded from. You will notice these numbers, how they jump. We had them all numbered. There is one, two, three, five, eight, twelve. All the in between numbers, I would say now in the machine shop, we can tell are all numbers, pieces of equipment that Lyco Machine Company are negotiating with us on [221] in conjunction with the lease.

Q. Copy of this list, say, including the list of machine tools contained herein, has been circulated among potential purchasers in the Bay Area?

A. Yes, there were printed copies made of that, and I have a copy of that that is a duplicate of that made from this.

(Testimony of Henry J. Arnaud.)

Mr. Peckham: At this time I will offer this to be admitted into Evidence and marked Plaintiff's Exhibit next in order.

Mr. Neblett: No objection.

The Court: Admitted.

(List of machinery was introduced and received in Evidence as Plaintiff's Exhibit No. 5.)

Mr. Peckham: No further questions.

The Court: Anything further, Mr. Neblett?

### Redirect Examination

By Mr. Neblett:

Q. You were asked this morning, Mr. Arnaud, some questions relating to paragraph 3 of the bill of sale, particularly that part of the paragraph which relates to the sale of the machinery, tools and equipment. I will read the part of it I have in mind.

“Vendee for a period of ten years from date hereof will not sell or dispose of,”

and so forth, [222]

“any of the machine tools or severable production equipment in the plant as described above, the loss of which would materially reduce the capacity of the plant to produce the items for which it was designed, unless replacement is made by equivalent machine tools or new severable production equipment.”

Are you familiar with that provision?

(Testimony of Henry J. Arnaud.)

A. Yes, I am.

Q. Now, if you were required—if the company were required to replace this machinery,—tools and equipment, could the company do so?

A. I definitely think we can for several reasons. Number one, financially the company is in very good standing. But besides that, it has the backing of very substantial people in the Bay Area, and I can name a few such as Jules Agostini, Mr. Roland, Mrs. Hanford Morgan, Charlie Field, Mr. Cox—there are thirty or forty of them. They are all outstanding citizens of the area, all men with means, and I know if necessary, which I don't think would be, they would be behind us. Then as far as the purchase of equipment, yesterday there was a man on the stand by the name of Mr. Bulotti, who contacted us at the yard and in fact he was very irritated because we were offering this equipment for sale at a price he said he couldn't sell it for. In fact, he told us he could produce all that equipment we had for sale immediately at a cheaper price. [223] That is the statement he made to us, which is altogether different from the statement he made here yesterday.

Mr. Peckham: I object on the ground that wasn't responsive to the question and move to strike the answer from the record.

A. Now, there is another——

Mr. Neblett: Wait a minute.

The Court: Oh, I think I will let it stand, Mr. Peckham. It may be in a sense a voluntary state-

(Testimony of Henry J. Arnaud.)

ment. I don't recollect Mr. Bulotti testifying as to value. I think he testified to the availability.

A. That is right.

The Court: The availability of machinery. He didn't testify as to value.

A. Besides that, naturally, we have had the availability——

Mr. Neblett: I think you have fully answered the question, Mr. Arnaud.

The Court: Let me ask you something: The names you have given me, I recognize some of them. Are they stockholders in the company?

A. They are stockholders in our company, yes.

The Court: Of course a stockholder wouldn't be liable for something, some indebtedness, of the corporation.

A. That is understood.

The Court: What is the net worth of that company, what [224] does it consist of now?

A. Well, that is a problem that I think I should refer to our accountant, don't you think so?

The Court: Yes, perhaps.

A. Because he can give you everything to date.

The Court: Of course this Oakland Dock and Warehouse Company, that is just one enterprise of a group of citizens, isn't it?

A. Well, let me explain it this way: I will say that most of the stockholders that are involved in this Oakland Dock and Warehouse property are also involved in other properties that Mr. Agostini is president of as well as president of this property,



(Testimony of Henry J. Arnaud.)

such as the Latham Square Building in Oakland, the Rialto Building in San Francisco and, oh, sixty-five large buildings. I can't say every stockholder here is involved there. I am not familiar with the others, but I know that they are involved in——

The Court: I know there was a group of men, it seems to me most of them were Alameda citizens, who acquired a number of buildings and they acquired this property, a group of men and women.

A. Well, this is a group of men and women. Mostly I would say they are all East Bay citizens, most of them at least.

Q. (By Mr. Neblett): Mr. Arnaud, that group you have mentioned, Mrs. A. Hanford Morgan and Mr. Jules J. Agostini, Mr. Charles [225] Roland, and Mr. Carl Pier and Mr. Albert Cook, I believe it is?

A. Yes.

Q. And yourself, you are a stockholder, aren't you?

A. Correct.

The Court: Of course a stockholder isn't personally liable in California for debts of a corporation.

Mr. Neblett: I understand that, your Honor, but I am asking—we brought this up to show this is a substantial concern. For instance, we remember when your Honor stated the other day in court he had represented for many years the Bank of America. Well, our firm represented the Bank of America, too, in quite a few respects and for quite some time, and we know that if something happened which the Gianninis were backing it may stand with confidence. This is not just people—so far as buying

(Testimony of Henry J. Arnaud.)

this, this piece of property was desirable, bought for an investment, and they created that brochure, and this piece of property is being developed for civic improvement, brings it back on the tax rolls in Oakland which it wasn't before, and it is really a development in which the community is highly interested and it is greatly needed in the community. I think I am justified in making that statement.

A. May I say that as far as the community is concerned——

Mr. Neblett: Just a minute, Mr. Arnaud, I think we won't have you volunteer anything. I think that is all I have to ask the witness. [226]

Mr. Peckham: I think for the record I should state the Government's position, of course, is that the financial responsibility of the corporation, which has not been established, is not the criteria of the irreparable damages.

The Court: I know that.

Mr. Peckham: Or adequate remedy at law. May I ask two short questions for the record?

The Court: Yes.

#### Recross-Examination

By Mr. Peckham:

Q. Mr. Arnaud, directing your attention to the machine tools that have been sold by your corporation, isn't it a fact that you have not obtained a written consent of the Secretary of the Navy or of anyone, the Munitions Board or Secretary for Defense, in order to make those specific sales?

(Testimony of Henry J. Arnaud.)

Mr. Neblett: I object to that. I think consent appears in the modified quit claim deed, and consent appears also following the modified quit claim deed, the releases and the chattel mortgage. I think it tends to vary the terms of the written contract.

The Court: I understand the position and I will let him answer because the question means with the exception of those things you have just mentioned like the modified—if he obtained any written consent other than those things. Have you?

A. I sold them on the basis of what our Counsel tells us we had a right to sell. [227]

The Court: Yes, but did you go and get a written consent other than the written consent that may be implied? A. I didn't feel I had to.

The Court: You didn't do it?

A. No, I did not. As far as the chattel mortgage, I made it a point to see that was paid off.

Q. (By Mr. Peckham): But now one more question: Directing your attention again to the machine tools that have been sold by the corporation, none of those machine tools has been replaced in the yard, isn't that correct?

A. That is correct.

Mr. Peckham: No further questions.

Mr. Neblett: That is all.

(Witness excused.)

Mr. Neblett: Mr. Deede.

Your Honor, this witness was on the stand this morning.

The Court: Yes, he went to try to find a memorandum.

RALPH G. DEEDE

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Neblett:

Q. Mr. Deede, have you found the paper which came from your office? A. Yes, I have. [228]

Q. May I see it, please?

The Court: That is the memorandum you referred to this morning from which the amended deed was drawn?

The Witness: Yes, that is right.

Mr. Neblett: I show this memorandum to Counsel.

We offer this in evidence, your Honor, this document on behalf of the Defendant.

Mr. Peckham: No objection.

The Court: Defendant's Exhibit E introduced and filed in evidence.

(Whereupon the document above referred to and marked Defendant's Exhibit E was received in evidence.)

Mr. Neblett: With your Honor's permission I will read just a part of it into the record.

The Court: Yes.

Mr. Neblett: "General Services Administration, Liquidation Service, Washington, D. C." There

(Testimony of Ralph G. Deede.)

are certain pencilled marks on the document which we aren't offering. I suppose that is inter-office communications, isn't it?

A. Yes, that is correct.

The Court: The record will show that in offering the exhibit the pencil mark notations are not part of it.

Mr. Neblett: "Mr. Robert B. Baker Bradford, Regional Director, Liquidation Service, General Services Administration, [229] 1000 Geary Street, San Francisco 9, California."

(Whereupon Defendant's Exhibit E in evidence was read into the record.)

Mr. Neblett: Then an inclosure is attached and the inclosure is the proposed modifications of the covenants and conditions of the quit claim deed.

The Court: Those are the ones in the amended deed.

Mr. Neblett: They are the same as the deed, in the amended deed.

Mr. Deede, Mr. Hull is the chief counsel for the Regional office of General Services Administration here, is he not?

A. That is correct.

Q. And do you—you say you have seen this deed as executed?

A. Yes, sir; that is right.

Q. And the deed as executed by the General Services Administration here is the same as modified by those modifications which were attached to that lease?

A. I think that is correct; I think it is identical.



(Testimony of Ralph G. Deede.)

The Court: A comparison with that will show.

Mr. Neblett: That is all.

The Court: Yes.

Mr. Peckham: Although Mr. Neblett has called Mr. Deede, your Honor, I think perhaps at this time it might be well to have Mr. Deede testify as to the machinery that has been released [230] from the chattel mortgage on the assumption that this machinery that has been sold—we now have those items.

The Court: Have you got that list?

The Witness: Yes.

The Court: All right, produce it and we will put it in evidence.

### RALPH G. DEEDE

having previously been sworn, was called as a witness on behalf of the Government.

### Direct Examination

By Mr. Peckham:

Q. Mr. Deede, you have in your hands the War Assets Administration folders, have you not?

A. That is correct.

Q. And are those folders—are the numbers of those folders the numbers that are found in the bill of sale of June 1, executed by Robert Bradford?

A. The—well, this isn't the exact folders, but it is a duplicate copy of the information that appears on the folders.

(Testimony of Ralph G. Deede.)

Q. I see, and does it have folder numbers?

A. Yes.

Q. And that is an official record of the War Assets Administration?      A. That is correct.

Q. And is kept within your custody and control?      A. That's right. [231]

Q. Now, I will show you a copy of the bill of sale with the folder numbers listed thereon, and this being a copy of the bill of sale which is annexed to the Complaint, and ask if the information contained on those folder numbers shown in the bill of sale, that they are the ones in the document that you now have?      A. That is correct.

The Court: In other words, the numbers there correspond to the numbers on the bill of sale?

The Witness: Yes.

The Court: Let me ask just one question. I notice that the bill of sale is by Roman numeral. Each of those numbers represent one machine or batch of machines?

The Witness: I tell you this, your Honor, this is such a voluminous inventory that rather than to duplicate on an itemization basis, we referred to the equipment listed in those particular folders, and that is composed of several items, each folder may have as many as from ten to fifty items listed in it, and rather than to have such a voluminous bill of sale and go to that recording expense, we referred to the equipment by folder as they appear in our files.

The Court: You are about to give me a list of

(Testimony of Ralph G. Deede.)

the property upon which release has been made from the chattel mortgage?

The Witness: That is right. [232]

The Court: Were they given by folder entirely?

The Witness: Maybe I can show you this, your Honor, so you will understand it.

The Court: Part of one page, or one folder was sold.

The Witness: For example, here we start with folder 11-1 and all of this equipment appears in folder 11-1, several items on this page, and this is the original that appears in that particular folder. It shows the quantity by tag number, the condition and acquisition cost.

The Court: I see, but I asked you also when they sell—didn't sell—when they asked for releases from the chattel mortgage, partial releases, were those always by folders?

The Witness: No, they weren't. Generally they were by items except for the one exhibit, the original exhibit which was referred to in the bid invitation as Exhibit G, which was itemized, and when the Oakland Dock and Warehouse Company—and that was not covered by the National Security Clause, that was property which was more or less scrap and we authorized them to sell that at the time that we advertised this for sale, to resell it.

The Court: Yes.

The Witness: That was a voluminous document and there were certain folders that that appeared in. I think, if I recall correctly, it probably cov-

(Testimony of Ralph G. Deede.)

ered about ten or twelve different folders, but it didn't cover the equipment listed in [233] those folders in their entirety, so that the Oakland Dock and Warehouse Company asked us to establish a release price on the remaining items of equipment that appeared in those folders so that we could release it on the basis of so many folders, which we did, and since that time all the requests for releases have been on an itemized basis except for one, if I recall this correctly, and that covered a lot of items that were in the big warehouse over there, and there again it was a voluminous list, so it was released on the basis of folder numbers rather than on an itemized list.

The Court: In other words, sometimes you released it on an itemized list and sometimes on the folders?

The Witness: That is right. If it wasn't a lengthy list it was released on an item list.

Q. (By Mr. Peckham): Mr. Deede, did you have the releases, partial releases that have been executed by the War Assets Administration and delivered to the Oakland Company?

A. Yes. I don't have those right here.

The Court: Can't we just get a list of them?

Q. (By Mr. Peckham): I just thought I would put it that way and compare it with the list.

A. That is quite a job of comparison, a lot of items.

Mr. Peckham: Your Honor, there is going to be

(Testimony of Ralph G. Deede.)

a little problem, the items are so numerous that it wasn't feasible or possible at the time to make a list on a separate piece of [234] paper, so as I understand it, what has to be done, Mr. Rawleigh and Mr. Deede have gone through the folders and marked the items that have been released. They are found in that document he is now handling.

The Court: It would make this record about one thousand pages long.

The Witness: It really will, because there are a lot of articles that have been released.

The Court: Couldn't you give us a list of the items by folder and those that weren't released by folder, by inventory?

The Witness: I have copies of all those releases with me, but just on a folder basis, or a folder number basis, and then all those released on an item basis, we have copies of the releases themselves.

The Court: Couldn't you copy those all on a piece of paper?

Mr. Peckham: With sufficient time.

The Court: I'll just take his word for it. He can prepare it and you can offer it.

Mr. Peckham: All right.

The Court: Is that all right, Mr. Neblett? In other words, rather than put in all these releases with the descriptions of property, why not, can't we just put the property list on a piece of paper by description or by folder or by description itself and offer that in evidence as the property that has been disposed of?



Mr. Neblett: We have such a list here prepared by the auditor, which we will be glad to furnish Counsel. Just the list your Honor is talking about, a typed list.

Mr. Peckham: We would like to see it.

The Court: Let us get that. Is that the man from Herrick's office?

Mr. Neblett: Yes, sir.

The Court: Let him come up here. Have you got the list? You can sit next to me.

E. W. HORTON

called as a witness by the Court.

By the Court:

Q. What is your name? A. E. W. Horton.

Q. Are you connected with Lester, Herrick & Herrick? A. That is right.

Q. The record will show they are certified public accountants in San Francisco. Now, have you got a list that you prepared from the records of the defendant in this case as to property, personal property which has been acquired from the Government which has been sold?

A. That is correct, I have it right here.

Q. What did you make that list from?

A. From the facility condition report prepared by the War Assets Administration and reported as the actual sales as [236] recorded on the books of account.

The Court: Take a look at that. Think that is

(Testimony of E. W. Horton.)

approximately right? I am directing my question to the witness.

Mr. Peckham: Your Honor, the accountant hasn't been sworn.

The Court: Oh.

Mr. Peckham: I didn't know if he was to testify or not.

The Court: Is it stipulated that he was sworn and the testimony already given was given under oath? Swear him in now.

Mr. Neblett: We will so stipulate.

The Court: Just stand up here.

### E. W. HORTON

called as a witness by the Court after being first duly sworn, testified as follows:

#### Examination by the Court

By the Court:

Q. If I asked you the same questions I had asked you before, before you were sworn, you would give the same answers?      A. I would, yes, sir.

The Witness Deede: Your Honor, in looking at this list it would be impossible for me to say that these were the items that we released for this reason: The first item on here is a Bay City crane. There were several Bay City cranes over there, and unless I knew which Bay City crane it was I couldn't [237] tell whether it had been released. There have been some cranes released, however.

(Testimony of E. W. Horton.)

The next one is a crane car, Wurley crane, I don't know whether the one we released, we did release one Wurley crane. We had some drill presses listed here and there has been some drill presses released and no way I could identify. For example, I want to explain to you what I mean. On one page here we released on March 31 one drill press, the number 1206, and on the same page we released another drill press, 1210, both made by the same manufacturer, but on that page, one, two, three, four, five, six, seven, eight, ten, eleven drill presses listed on that page, so it would be impossible for me to say that these were the ones that we released as the items of equipment.

The Court: Would you take a copy of this Mr. Peckham, and I will admit this in evidence and assume it is correct unless you point out after you have checked it.

The Witness Deede: I can do this, your Honor: This is a facility condition report he is talking about. I can give this to the Counsels with an itemized statement and say that the equipment appearing on page number so and so has been released by War Assets Administration. These pages are all numbered and—if that would simplify it without having to rewrite the whole business.

Mr. Peckham: In other words, Mr. Deede, that would be [238] verifying the list by checking against the folder?

The Witness Deede: Yes.

The Court: Take the list and verify it and we

(Testimony of E. W. Horton.)

will admit the list in evidence now and then point out, if you find any discrepancies in it, what they are.

The Witness Deede: Okay, that will be all right.

The Court: I notice you have cost down here?

The Witness Horton: Yes.

The Court: Is that the cost to the Oakland, to the defendants here, or cost to the Government?

The Witness Horton: That is the cost to the defendants.

The Court: Cost to the defendants?

The Witness Horton: Purchase cost based on the ratio that the original ratio cost as shown in the facility condition report to the amount allowed under the chattel mortgage for personal property, which is 10.7 on the cost as shown.

The Court: I see. You follow that?

Mr. Peckham: In other words, the ratio of 10.7 was used, is that correct, Mr. Accountant; is that correct?

The Witness Horton: That is correct.

Mr. Peckham: In other words, the figure, the total figure of \$366,000, which was paid by the Oakland company for the personal property represented 10.7 of the original cost?

The Witness Horton: That's correct.

The Court: As given by the Government's facilities report. [239]

Mr. Peckham: Yes.

The Court: Is that correct?

The Witness Horton: That's correct.

(Testimony of E. W. Horton.)

The Court: Will you put this list that the witness—what is your name again?

The Witness Horton: Horton.

The Court: Horton has testified to in evidence and if neither one of the Counsel want to mark it, mark it as the Court's Exhibit.

The Clerk: Court's Exhibit 1 introduced and filed in evidence.

(Whereupon the document above referred to and marked Court's Exhibit 1 was received in evidence.)

Mr. Peckham: May we each have a copy?

The Court: Yes, if you don't mind.

The Witness Horton: Not at all.

The Court: Better give Mr. Neblett a copy. Anything more of this witness?

Mr. Peckham: Nothing at the present time, your Honor.

The Court: You want to examine Mr. Horton now?

Mr. Neblett: No, your Honor.

The Court: Anything else?

Mr. Peckham: Just one point of the accountant, your Honor. There is the question that has come up from time to time as [240] to the financial responsibility of the corporation. While the Government doesn't, as you understand our position, doesn't feel in this case to determine the adequacy at law, I wonder if your Honor would want any



(Testimony of E. W. Horton.)

testimony as to the net worth of the corporation.

The Court: Can you state offhand the net worth of this corporation at the present time?

The Witness Horton: The shareholders' equity as reflected as of May 31, 1950, shows approximately \$316,000.

The Court: \$316,000.

The Witness Horton: The shareholders.

The Court: By that you mean that is over and above what they still owe the Government?

The Witness Horton: That is the net worth, \$316,000.

The Court: What liabilities are taken off the gross worth to make that net worth?

The Witness Horton: Approximately?

The Court: Approximately, yes. What are they, the balance due the Government?

The Witness Horton: Due the Government and accounts payable. Accounts payable are \$20,000 and the amount under the quit claim deed and the chattel mortgage is about \$752,000.

The Court: Anything more from him?

Mr. Neblett: No, your Honor.

(Both witnesses excused.) [241]

Mr. Peckham: Your Honor, at this time I would like to make a statement. It was our intention, after ascertaining specific pieces of property that have been released from the chattel mortgage and assumed to have been sold, and also having the entire list of the personal property that is there and also having a list of the property that Lyco Company

desires to have included in a long term lease, if one is to be executed, that we would call a competent witness or witnesses to testify as to the sale of the property that is not to be included in the list that Lyco desires, that the sale of that property would reduce the capacity of the plant. The witness that we desired to call is Mr. Vaughn, who was superintendent of this particular yard during the war and operated the yard and who is now general superintendent of Moore Dry Dock Company. Mr. Miller, of Probeck Phlager and Harrison informs me now that they cannot reach Mr. Vaughn, that he is out in the yard somewhere and Mr. Wille who testified yesterday is in the courtroom. However, Mr. Wille, as your Honor recalls was qualified as an expert from the point of view of purchasing and not from the point of view of operating the ship yard, and it would seem to me as though it would be necessary for us to establish that particular point, that we call Mr. Vaughn.

The Court: Maybe Mr.—I will allow you to do that after the evidence is furnished, whatever evidence he has got [242] to introduce, and then if he wants to controvert what Mr. Vaughn says, then I will let him. Do you have any other witnesses?

Mr. Neblett: The Defendant rests, your Honor.

The Court: Now, you understand that Mr. Peckham wants to introduce testimony of Mr. Vaughn, who used to operate that yard for Moore Shipbuilding Company, for the purpose of showing that this machinery, which is not to be leased to Lyco but is purported to be sold, would prevent it—what is that language again? I can't remember.

Mr. Peckham: Material reduction of capacity.

The Court: Would materially reduce the capacity of the plant to produce the items for which it was designed. And I told them I would allow them to do so and allow you to introduce anything to controvert that. You understand what I mean?

Mr. Neblett: I understand what you mean.

The Court: In other words, the statements in the Complaint and the statements in your counter affidavits are, in a sense, conclusions. You deny what is being done reduces the plant's capacity, whatever it is, and the Government claims it would, and it may have a bearing on this subject, I don't say it has, but it may have a bearing on the subject. Certainly, if it was disclosed that it didn't make a particle of difference as to the capacity of this plant that you give away, throw away [243] the obsolete stuff and so forth and sold it, I wouldn't feel like granting an injunction on that basis. On the contrary, if it appeared to me if one of the elements was to reduce this plant to such a condition that it never could perform what is was intended to perform when it was built and that vitally affected the National policy, then I might more seriously consider the proposition.

Mr. Neblett: If your Honor please, we would interpose an objection to that testimony because we haven't yet gotten down to it—it has been introduced in evidence, but has been reserved for evidence, to point out to the Court how this whole situation has changed since the quit claim deed was modified. In other words, it is true, as alleged in our affidavit that we first asserted that the whole

transaction was void and then the quit claim deed was modified so that the Security Clause was taken out entirely as to the personal property.

The Court: I want to hear from you on that in just a few minutes, but right now you're finished putting in whatever evidence you have to offer today?

Mr. Neblett: I have, your Honor.

The Court: Mr. Peckham wants to offer this testimony to which you object. You haven't your man here now?

Mr. Peckham: His name is Mr. Knapp, your Honor.

The Court: Mr. Knapp. Mr. Clerk, what is the state of the calendar for tomorrow morning, just to give me an idea? [244]

The Clerk: I don't believe we have much on the calendar for tomorrow.

The Court: Then I will allow Mr. Knapp to testify tomorrow at 10:30 if you can reach him.

Mr. Peckham: Surely.

The Court: Then if Colonel Neblett wants any time to contradict what he says or bring in anything I will give him an opportunity to do that. So that is all the evidence with the exception of Knapp and anybody Mr. Neblett wants to use to contradict what Mr. Knapp says, is that correct?

Mr. Peckham: Yes.

Mr. Neblett: I think so.

The Court: Then I want to hear from you, Mr. Neblett, as to how that amended deed—just on this



subject, no use going back over everything else we have covered; we have the record on it and I have notes on it—how did that change the bill of sale.

Mr. Neblett: I will be glad to do that, your Honor.

The Court: Would you like a recess for a minute or so so you could get your data together here?

Mr. Neblett: I believe that would be desirable.

Mr. Peckham: Your Honor, there is one point I want to bring up in connection with the evidence. There has been reference made in the testimony of Mr. Arnaud that a list of machinery had been compiled that was the subject of negotiation [245] between Lyco Company and Oakland Company, and I don't believe that was ever placed in evidence, and to what extent that might be important in your Honor's determination of the material reduction of the capacity of the plant, to that extent I think it should be in.

The Court: Who has got that?

Mr. Neblett: I have. I will be glad to produce it.

The Court: Could you produce it in evidence and have it marked? Have it marked as the Court's exhibit, if you wish.

Mr. Neblett: In order that this transaction may be complete, there have been some changes in it. To show what the negotiations are that are going on with Lyco, I will make this statement as Counsel in the case, that when Mr. Agostini, the president, and Mr. Arnaud, vice-president were approached on this proposition to make a lease, Lyco Machine Works through Mr. Mark Hardin, the president,



and Mr. Walter Lynch, the vice-president asked for a letter giving a general outline of the proposition; and such a letter was written by Mr. Agostini the president of the corporation, on May 26. I don't have all the exhibits to that letter, but I do have the machines list. However, we could produce them. I don't think the Court would be interested in bound books, photographs, and things of that sort. But we do have these two lists and are perfectly willing to make them available to the Court and Counsel.

Would the Court suggest I introduce it in evidence ? I [246] would be glad to do that.

The Court: Yes. I understand the list is a list that they proposed to include in the new lease to Lyco?

Mr. Peckham: Yes. Of course, Counsel made comments from time to time which I haven't answered. I would like to make this comment at this time, and that is this restraining order now, and if a preliminary injunction issues, of course has no effect on the lease that might be negotiated between Lyco and Oakland.

The Court: If I issued any restraining order I certainly would make it without prejudice to their right to lease to Lyco.

Mr. Peckham: They have actually been leasing the property over there under the Security Clause, and so that really I don't think is a determining factor.

The Court: What you are calling for now is a list of the property that they propose in this new

proposed list that they have negotiated to lease to Lyco, is that correct?

Mr. Peckham: Yes.

The Court: Well, you might look that over during the recess and see if you will accept that in evidence, and Mr. Neblett will offer it.

Mr. Neblett: The question has arisen, while Counsel is looking at that list, the question has arisen in regard to our right of the company to lease the property. That question [247] is not involved here at all. We have a clear right under the bill of sale.

Mr. Peckham: That is right.

Mr. Neblett: The quit claim deed, as well as——

The Court: They have a right to lease it subject to the Security Clause.

Mr. Neblett: Subject to whatever——

The Court: Whatever conditions are. Assuming that there are certain conditions to the bill of sale that are modified by the amended deed, you would have a right, perfect right, to lease the property subject to those conditions. No doubt in my mind about that.

Mr. Neblett: Very well.

The Court: But I would like to hear from you at the end of the recess on this question of that amended deed, how it affects the situation.

Mr. Neblett: Very well. I am willing to offer this if Counsel wants it, this machinery wanted in the machine shop by Lyco. I have it here.

The Court: All right. I will admit it in evidence as a purported list of the machinery that Lyco was

contemplating taking in the fifteen year lease that is now being negotiated. Is that correct?

Mr. Neblett: Yes, your Honor.

(Document entitled "List of Machinery" was admitted into Evidence as the Court's Exhibit No. 2.) [248]

(Thereupon a short recess was taken.)

The Court: All right, Mr. Neblett.

Mr. Neblett: Your Honor please, I will carefully refrain from covering anything that we have covered in argument before. This our point that we have that was mainly raised by the affidavits and the Answer and by the testimony of Admiral Klein here this morning.

To start with, we had a Letter of Intent. That was the first thing, the first document in this transaction which had anything to do with the situation that in my belief is before the Court at this time. And that Letter of Intent is Plaintiff's Exhibit 1 and it says, among other things, that, "title to be conveyed by quit claim deed and bill of sale without warranty, express or implied, and you will execute a promissory note secured by a deed of trust and chattel mortgage," then the other things about who is going to pay for the recording, and so forth.

The quit claim deed and the bill of sale were executed pursuant to that Letter of Intent. Under the Letter of Intent the Oakland Dock and Warehouse Company had to take possession of the property on June 1, 1949. But there were quite a few discussions between War Assets and the Company, in which I

participated, that carried the execution of those title instruments over until June 29th, but they were executed as of June 1, 1949. [249]

We had the bill of sale, which is attached to the Complaint as exhibit 1. That was delivered to us at the same time and it has come up here from time to time that that bill of sale was recorded. That is an error. It never has been recorded. That has come up in statements between Counsel here from time to time, but the bill of sale was not recorded. The quit claim deed, however, was recorded, the chattel mortgage was recorded, and the deed of trust naturally was recorded.

We have a bill of sale here which says that the chattels are conveyed outright "to the vendee, Oakland Dock and Warehouse Company by the Government, vendor, to have and to hold the same unto the said vendee, its successors and assigns, without representation of warranty, express or implied, as to the title or condition thereof, subject to the following covenants, restrictions, conditions and reservations."

The Court: I am familiar with that.

Mr. Neblett: Yes, I know, your Honor. I am trying to tie it in to the quit claim deed. The only Security Clause reserved in the bill of sale is the one which refers back to the quit claim deed.

Now in paragraph 1, "the Government owned portions of the Moore Dry Dock Company West Yard, Oakland, California hereinafter referred to as the 'plant,' in which the above described chattels are located, is considered a War Reserve Plant and

of such will be of vital interest to the Nation [250] in time of emergency.”

I don't think that recital means anything at all. It is just a declaration of interest, we will say, or declaratory of possible interest in the future.

This, however, is important: “In a quit claim deed, of even date, and delivered concurrently herewith, whereby the vendor herein conveys its interest in and to certain portions of the shipyard, identified above, to the vendee herein, the vendor herein has reserved a dormant estate in said plant, for a priod of twenty years, which dormant estate may be activated for one or more periods not exceeding five years' duration each.”

The importance of that reference, your Honor, is that there is no reservation of a Security Clause in the bill of sale if we do not have that quit claim deed in connection with it, because in no place in the bill of sale does it say how, when, or what circumstances the Government might activate the dormant estate.

It is generally conceded by everybody now that the Government has an option to lease that property. That is what it has now. The first option to lease, we contend, was void, but that is out of the picture because we concede that the modification of the quit claim deed and the option to lease which the Government now has to lease the place is valid in our opinion, signed by both parties and expresses the option to [251] lease in terms which we think are perfectly sound in law.

It has been said by Counsel that this case is so im-



portant because the entire Industrial Reserve hangs upon the decision of this Court. That is an erroneous statement by Counsel because the Government still preserves that Security Clause for the purpose for which it desired it from these amendments.

Your Honor, it is unnecessary for me to trace how this determination arose. I think the Court remembers the testimony of Admiral Klein, introduced this morning, and the testimony of Mr. Deede, which finally got the proposed modification approved by the Munitions Board or Department of Defense in the hands of the War Assets Administration regional office where that amended quit claim deed was executed. We have to go back to the old quit claim deed now for the purpose of showing how the document was modified so as to remove the Security Clause entirely from the personal property, even though it at one time existed—even though it was valid in the first instance.

We have attached to the affidavit of Mr. Agostini a copy of the original quit claim deed, and that has been now introduced in evidence. That was an outright conveyance, that quit claim deed, of the real property and improvements thereon to Oakland Dock and Warehouse Company. It reserved the dormant estate, and so forth.

Paragraph 3 of that quit claim deed provides that: [252]

“The grantee, or the secretary, may at any time cause a re-examination of the necessity for continuing the dormant estate upon the plant or any portion thereof. Such estate may be discontinued at

any time during the twenty year period when the Secretary determines such action consistent with the National Defense inteerststs of the United States."

Well, we move in under that paragraph. I wouldn't like to say that when these deeds were given to us that I felt at all that this Security Clause as put forth in those deeds was valid. I didn't think so, your Honor, and said so very freely. I merely say that to make my position clear on it.

We made our application under paragraph 3 to remove the Security Clause altogether. And the conclusion of our principal was that the Security Clause was void and the Government would not desire to hold over the heads of its citizens a void deed. But there was a rather qualified disagreement with us by the Navy only. We were referred to the Navy, as the evidence already shows, and Counsel for the Navy, the argument there was, while there was no common law background to this dormant estate, that nevertheless the Secretary or Assistant Secretary of the Navy and attorneys for the Navy believed it would be upheld by the courts on the broad general ground of public policy.

Well, the original quit claim deed provided this in paragraph 10: [253]

"The grantee will maintain all lands, structures and appurtenances now in or appurtenant to the plant and belonging to The United States of America at the time of sale through the period specified below in such condition that the plant can be put into efficient operation for

its intended defense use in the shortest possible time, but in no case in excess of 120 days; provided, however, that grantee shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified;”

I want to read that again.

“shall not be obligated hereunder to retain or replace any facility after the expiration of the period of maintenance hereinbelow specified; and provided further that nothing contained in this agreement shall be construed to prevent the grantee, for improving operating efficiency or increasing productive capacity from moving any of the machine tools or readily severable facilities conveyed hereunder from place to place within the plant.”

Now, we have in that deed the following paragraph, facility on one side and period of maintenance on the other.

The Court: What are you reading from?

Mr. Neblett: From the original quit claim deed.

The Court: Oh. [254]

Mr. Neblett: The one referred to in the bill of sale as the so-called dormant estate or security clause.

Paragraph A:

“Lands, permanent structures and appurtenances (main structural frame of metal, concrete or masonry) twenty years.

“(B) Timber structures and their appurtenances, fifteen years.

“(C) Machinery, machine tools and equipment, ten years.”

Now, that is the only Security Clause with respect to the machinery tools and equipment that have ever been reserved.

Now, there are provisions further in this quit claim deed for the activation of this estate. In other words, the Secretary, in the event of an emergency can activate the estate and take it over. This is the old quit claim deed I am talking about—take it over and operate it for periods of not to exceed five years each. There is no reverter in the deed, and this original quit claim deed did not comply with the Security Clause in force at that time. Somehow or other there was written into this deed, I don't know how, because we had nothing to do with it, the old Security Clause that was in force and effect prior to the time of the passage of Public Law 883, and it did not write into this deed such requirements as the Muni-tions Board required to be put into the [255] quit claim deed, such as this property had to be designated under Public Law 883, and it was held and so forth.

Now, if your Honor please, when we came to the discussion of this thing, it is apparent from this deed and from the evidence that is before this Court now and from the evidence that was introduced here this morning by Counsel for the Government, namely, the report of 1949, that the only thing that

the Government was interested in was sites. Now why is this not an important case from the standpoint of the Industrial Reserve? Because the Government had gotten exactly what it wanted as shown by this letter that was written here by Mr. Joyce saying that the Munitions Board is quite anxious to have this matter taken care of as soon as possible. That is the amendment he is talking about.

Now, this amendment, it came up, of course, as shown by the report of the Munitions Board, that the site is the only thing involved in the matter of the Security Clause, made its full vigor on that site. It is only the machinery that the Security Clause—we will refer now to the modifications of the quit claim deed, and looking at the deed we will find that the provisions about the Security Clause on the personal property is ten years, has been omitted and deleted from that deed. It isn't in there any more. So we have been talking about something here that does not if—I made the statement this morning—that if the Government had put this amended [256] quit claim deed in its Complaint, it properly, couldn't possibly state a cause of action.

How does the new paragraph 10 read? These paragraphs are the same all the way through, they are numbered the same, each paragraph corresponds; I think that is true. Now, here is what the new—I may be wrong about the corresponding paragraphs—here's what the new paragraph 9 provides in the modified quit claim deed.

“During the twenty-year period, the grantee will not make any alterations, improvements,



additions or extensions to the buildings and structures or erect any new building or structure on the premises which would diminish the capacity or impair the utility of the plant for the business for which it was designed, unless the plant can be restored to efficient operation for its designed purpose within not to exceed 120 days.”

Now, there is another provision in the deed that it would be the duty of the grantee, the Oakland Dock and Warehouse Company, to put this plant into operation on whatever notice is given by the Secretary of Defense for whatever use the Secretary of Defense might put it. The Secretary of Defense may use this to manufacture guided missiles. It is apparent from the reports of the Munitions Board of 1950 that he is not going to use it to build ships, but that is not an important argument here. [257]

Let us go on to paragraph 9:

“... provided, the grantee, during the twenty-year period may, alter, improve, add to or extend any or all of the buildings or structures now on the property,”

that is what we propose to do with the lease when it is made, we intend, they can extend and alter that building to make it large enough for their purposes, evidently isn't large enough for their purposes at this time.

“erect additional buildings and structures on all or any part of the premises not now occupied by the permanent buildings and the

piers and (3) replace any of the piers and non-permanent buildings and structures with piers and buildings or structures having equivalent capacity.’’

Now, that gives the right to do anything in the world that we want to do with the real property, provided it could be—that the Secretary of Defense could take it over in 120 days. Now, that is a question of judgment, that is a question of whether or not we build something, and that has to be torn down, the Government has a right to tear it down. We have to tear it down within 120 days if the Government wants us to provided the labor and materials are available, but otherwise, the Government has to do it itself and then the Government has to restore those buildings to the same condition they were at the time of the Government’s occupancy, or pay for the restoration of it. And it has to pay us rent during all this [258] time.

The only advantage of this contract as over eminent domain is that we have a contract with the Government. Now, that gives them rights to take possession within 120 days and it gives the right—in other words, the damage is a form of rent and restoration and set in advance. We have a contract with the Government.

The Court: How does this—I follow you to a certain extent. Of course, the original quit claim deed and the bill of sale made and the original bill of sale, it referred to the execution of the quit claim deed. How does this affect the conditions on the bill of sale?

Mr. Neblett: Well, the conditions—the only right of the Government to take over is found in the quit claim deed, and now that provision which the Government reserves the right to take over the personal property within a period of ten years from the date of this deed has not yet been eliminated from the quit claim deed. That was one of the principal points we had in argument. We would not go into this detail unless it were eliminated from the Security Clause. The old Security Clause provided that we had to maintain this property for ten years for taking over by the Government, but that Security Clause is no longer there, that maintenance for ten years as to the personal property. We now have twenty years as to the land and permanent buildings, of which there are only two on [259] the property, that the Government—suppose the Government were to come out on the modified quit claim deed and say now, we demand that you have all of this machinery now that we sold you, we reserved an interest in it. Well, an answer would be, where did you reserve this interest for us to keep it ten years so you could take it over? It isn't in here any more; it was in the original deed, but not in this one.

That was the main point. We realize and the Government realizes, in these discussions, the Navy and the Munitions Board and the Department of Defense, that we couldn't maintain that machinery over the property, crane rails thirty-five feet wide, interlacing the property, and build these buildings which they permit us to build. That was the reason

for taking out the ten year reservation with respect to the personal property.

There are other clauses which carry along, that is, in this deed, and this deed was made February 28th of this year with full knowledge of everything we were doing in the matter, with full knowledge of what we were going to do, with the full knowledge on the part of the defendants that we were going to sell this equipment, and I imagine that was the reason it was done. We wouldn't have touched—no point to us maintaining the ship yard up there—be no point of their modifying the deed and letting this machinery, tools and equipment rot for the duration with the rate of depreciation, almost depreciated [260] now. That is the reason for it.

The Court: Well, I will have to interrupt you, Mr. Neblett, because it is 4:00 o'clock and I have a habeas corpus proceeding on now, so we will continue this matter at 10:30 tomorrow morning. Have Mr. Knapp here.

Mr. Peckham: Yes.

The Court: And the arguments will be concluded.

Mr. Neblett: Very well, your Honor.

(Thereupon an adjournment was taken until Thursday, June 22, 1950 at 10:30 o'clock a.m.) [261]

Thursday, June 22, 1950, 10:30 o'Clock A.M.

The Clerk: United States versus Oakland Dock and Warehouse Company.

Mr. Neblett: If your Honor please, for the con-

venience of the Court I have here the original bill of sale, the original quit claim deed, and the modification of the covenants and conditions of the quit claim deed, and Public Law Number 883 in one spot. I was going to pass these to the Court, if it would be a convenience to the Court, instead of looking for them to the files. If the Court would like to have these before it when I am making my argument——

The Court: I would like to have them, and also that pamphlet of the law.

Mr. Neblett: These have all been introduced in Evidence, if your Honor recalls.

The Court: I think if there is any additional testimony, before there is any additional argument we should have that testimony now.

Mr. Neblett: Very well, your Honor.

Mr. Peckham: Your Honor, yesterday when Mr. Deede was on the stand he referred to a thick document in which there were the folders on which these specific items of personal property were listed. He only has the official copy with him again this morning. However, I believe there is a copy, [262] duplicate copy in the War Assets Administration Office. He identified it yesterday, and I wondered if Counsel perhaps would permit the introduction of that in Evidence if it is produced later today? I think that it would be—it would complete the record if we had the complete inventory of all personal property that was sold included as Evidence in this hearing.

The Court: Well, I thought we had that com-



pleted by the document that was introduced here by the auditor of the defendants.

Mr. Peckham: Well, that was a document of the items that had been sold.

The Court: Yes.

Mr. Peckham: Then this large document contained the folder lists all the personal property sold and unsold.

The Court: Oh, I see. If there is an extra copy, if you care to put it in Evidence.

Mr. Peckham: Yes. I will request that later.

The Court: Yes.

Mr. Peckham: At this time I will call Mr. Knapp.

#### SEWELL A. KNAPP

called as a witness on behalf of the Government in rebuttal, being first duly sworn, testified as follows:

The Clerk: Will you please state your name to the Court?

A. Sewell A. Knapp. [263]

#### Direct Examination

By Mr. Peckham:

Q. Mr. Knapp, what is your address?

A. My home address?

Q. Yes, sir.

A. 6257 Acacia Avenue, Oakland.

Q. What is your position at present?

A. General Superintendent of Moore Drydock Company.

Q. Briefly, what are your duties in that position?

(Testimony of Sewell A. Knapp.)

A. In charge of operations of the yard.

Q. Have you been with the Moore Drydock Company over a period of years?

A. Been in continuous operations since 1938. First went to work for them in 1916, worked various times previous between 1916 and 1938.

Q. Did you resume work for them during 1938?

A. Yes.

Q. During the period 1938 to 1946, in what capacity did you serve the Moore Drydock Company?

A. When I first went in, I went in as assistant general superintendent to Mr. Harold, and in 1942 or thereabouts I was appointed manager of construction repair for both yards, east and west yards.

Q. What was your capacity in relation to the west yard?

A. In charge of the Maritime Commission program of construction in the yard and improvements. [264]

Q. That was during the period of the last war, is that correct?           A. Yes.

Q. You are familiar with the machine tools and equipment that are located at the west yard?

A. Yes, I know the machine shop and tools.

Q. Are you familiar with that portion of the yard which has been sold to Oakland Dock and Warehouse Company?

A. I am not too familiar, but I understand it is the property on the west side of the yard, from the present Western Pacific diesel repair yard.

Q. I show you Defendant's Exhibit B, which is

(Testimony of Sewell A. Knapp.)

a map of the yard. Can you identify the Oakland portion?

A. This was, I understand, this was the property on this side here (indicating). This is still Western Pacific.

Mr. Neblett: Your Honor please, may the witness and Counsel raise their voices? I can't hear it.

The Court: Yes, speak a little louder, both of you.

A. This one, I understand, is the west yard that the Oakland Dock people have now. This is the piece of property that belongs to the Western Pacific Company and leased by the Government.

Mr. Peckham: This portion you have identified here, the west yard, Moore Drydock Company?

A. Yes.

The Court: The record doesn't show. If you have a blue [265] or red pencil——

Q. (By Mr. Peckham): The portion red pencilled is the portion that the Oakland Dock and Warehouse Company now owns, is that correct?

A. That is as I understand it, yes.

The Court: This is Exhibit——?

Mr. Peckham: Exhibit B of the Defendant.

A. This was part of the original. This has been reverted to the Western Pacific.

Q. (By Mr. Packham): Within that red outlined portion of Defendant's Exhibit B, you are and have been familiar with the machine tools and equipment that were located there?

A. Yes, sir.

(Testimony of Sewell A. Knapp.)

Q. Mr. Knapp, I show you the Court's Exhibit No. 1, which is a list of machinery and machine tools, this being the list that was introduced in Evidence by the accountant, presented by the accountant, and ask you if you identify those pieces of machine tool as the type that were in the Moore Drydock yard there at the west yard?

A. Well, this is equipment, I can say, that was in the west yard, similar type. The names are similar. Standard equipment which is in there.

Q. Then in the event that those pieces of machinery and machine tools were removed from the yard, would that materially reduce the capacity of the plant to produce the items for which it was [266] designed?

A. Well, in what I see here, if it is listed as 1, 1, 1, all the way through, which I guess it is, that wouldn't materially reduce the capacity. It would be probably, the radial drill and things like that in the machine shop, it is all very variable. You have a lot of expendable material down here.

Q. What items there would tend to reduce the capacity of the plant, Mr. Knapp?

A. I would say your Whirley crane, that is one of them. Then you get into the drill presses, radial drill, lathes, shapers, wheel press, electric drills—of course during the Second World War electric drills were almost impossible to get. I don't know how it would be now. Impact wrenches was another very hard to get. Hoists listed here, that is a \$2800 item. That is not so bad.

(Testimony of Sewell A. Knapp.)

Q. I see.

The Court: Suppose those machines listed there—are they one apiece, most of them?

A. I think it is, though there is no indication whether it is one or multiple. There is a crane listed at \$8,000, so that must be one crane. Those cranes are worth a great deal of money when purchased, much more than that.

Mr. Peckham: These costs, your Honor, were the costs to the Oakland Company, not the original acquisition cost. [267]

The Court: Yes. Well, in your opinion, suppose those articles on that list were taken from the yard, would it materially reduce the capacity of that plant over there to produce the items, these ships and so forth?

A. I wouldn't say greatly. You could feel it in the machine shop tools mainly.

The Court: In other words the plant, supposing war broke out, the plant could continue even though those had been taken away, could produce the ships?

A. Yes.

The Court: And accomplish the things for which it was built?

A. Yes, on that list you showed me there.

The Court: I suppose over there you have more or less duplication for emergency purposes?

A. We have duplicate machines in there because you have duplicate work going through. That is why there are two or three types, two or three lathes of the same type. Shapers, milling machines, same thing.



(Testimony of Sewell A. Knapp.)

The Court: You have to have that because there is more than one workman to produce them?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Peckham): Mr. Knapp, I show you Plaintiff's Exhibit 5, which has been introduced in Evidence, and is a [268] circular prepared by the Oakland Dock and Warehouse Company showing the items of machinery located at the yard that are being offered for sale. I wish you would look over that list (handing document to the witness).

The Court: Have you had an opportunity now, Mr. Knapp, to look over that? A. Yes.

Q. (By Mr. Peckham): Mr. Knapp, you recognize those items as items having been in the yard?

A. A number of them, yes. A good many of them, I know the unit.

Q. In the event, Mr. Knapp, that those items shown there on Plaintiff's Exhibit 5, the list you have in your hand, were removed, disposed of from the yard, would the removal and disposition of those items materially reduce the capacity of the plant to produce the items for which it was built?

A. Very definitely.

Q. On that list do you find so-called heavy type of machine tools? A. Yes, sir.

Q. Would you identify some of those?

A. Take your Tag No. 12, Niles tool. It is a lathe. 52" swing on a 32 foot center. That is one of the lifting tools with a bed break ten feet from the

(Testimony of Sewell A. Knapp.)

head stump. Radial drills, Tag No. 5. Tag No. 13, a Niles lathe there. [269]

Q. Could you just generally identify them, without specifically——

A. Yes. Just the tag numbers?

Q. Just the type of machinery, just what they are.

A. There is a slotter, shaper, shapers, milling machines, another lathe, radial drill, radial drill—that is about—in the machine tools there, that is about all, I would say, heavy tools.

Q. There are cranes listed there.

A. Cranes listed here. There are four fifteen tons; three, forty-five tons; one fifty ton; ten ton Cyclops travelling bridge crane. All those are large units.

The Court: May I see that for a minute? Do you have the record showing that the witness has been referring to Plaintiff's Exhibit 5?

Mr. Peckham: Yes, your Honor.

The Court: Now that Court's Exhibit there that you showed him there before, does Plaintiff's Exhibit 5 include the articles shown on Court's Exhibit 1?

Mr. Peckham: I believe it does, your Honor, but a small portion of them that have already been sold.

The Court: Yes. In other words, Plaintiff's Exhibit 5 covers that sold and that still offered for sale?

Mr. Peckham: That is right.

(Testimony of Sewell A. Knapp.)

Q. If any substantial portion of the items listed on Plaintiff's Exhibit 5 were sold, would that materially reduce the capacity [270] of the plant?

A. Yes.

Q. Is it your conclusion from having read over this list on Exhibit 5, Mr. Knapp, that most of the essential machine tools there in the yard are listed here?

A. No, not all of them. There is a lot more equipment in the machine shop that is not listed there

Q. I see. But there are essential items listed?

A. Essential tools. We used every one of those tools during the last war.

Mr. Peckham: No further questions.

#### Cross-Examination

By Mr. Neblett:

Q. Did I correctly understand your name to be Mr. Knapp? A. Yes, sir.

Q. K-n-a-p-p? A. K-n-a-p-p.

Q. Mr. Knapp, you tell us that you were familiar with the yard from the inception down to the present time?

A. Not from its inception, no, sir. Since about approximately '42, latter part of '42.

Q. '42? A. 1942.

Q. Well, the yard was full and complete—the yard was completed in 1942? [271]

A. That is right, sir. It was operated as a Navy

(Testimony of Sewell A. Knapp.)

yard previous to that. The first part of the work over there was for the Navy.

Q. You were with the Navy Departemnt?

A. No, sir, I was operating over there in the Maritime Commission after the Navy program was practically finished.

Q. The Maritime Commission operated the yard, anyhow, didn't it, during the war?

A. Yes, sir.

Q. And Moore Drydock Company, that is the old Moore Drydock Company, wasn't actually—they actually did the work for the Maritime Commission, is that correct?

A. They managed the yard there, is that correct?

Q. Yes.

A. They managed the yard there.

Q. You said, as I understood your testimony a while ago, that the sale of certain tools and equipment which were listed on the list which was presented to you would materially reduce the plant capacity. The plant's capacity to do what?

A. Which list of tools are you referring to?

Q. The list you testified from.

A. There are two lists there. The first or second list.

Q. I don't know what the first list contained. I couldn't hear everything that was going on, I am sorry.

Mr. Peckham: Court's Exhibit 1.

The Court: The list on Exhibit 5 is the one which he [272] said if a substantial portion of Ex-

(Testimony of Sewell A. Knapp.)

hibit 5—that is the one with the blue cover there—were removed from the plant it would materially reduce its capacity to produce the items that it formerly produced there.

Mr. Neblett: In other words, reduce the capacity of the yard to build ships, is that your answer?

A. Yes, sir.

Q. Would it reduce the capacity of the yard as a terminal warehouse facility?

A. I don't think that has any bearing on it. You are talking about building ships now. I don't know anything about your warehouse business.

Q. Then your answer would be that it would not reduce its capacity as a terminal warehouse facility?

A. I don't know, sir.

Q. You say that this equipment is difficult to procure, some of this equipment that you mentioned?

A. I don't know how it is today, but I know during the last emergency we were under terrific pressure to get it.

Q. You don't know whether it is difficult to get it now or not, do you?      A. No, sir.

Q. You are familiar with the former yards known as the Richmond Yard, the General Engineers, Todd Shipbuilding and so forth? [273]

A. Yes.

Q. Are you familiar with the work at Terminal Island, Los Angeles, and Western Pipe and Steel?

A. I was at both of the yards during the war.



(Testimony of Sewell A. Knapp.)

Q. You knew General Engineers, the equipment of General Engineers had been sold and very largely all of it was sold at Richmond, is that so?

A. I believe so.

Q. And are you familiar with the condition at Mare Island and Hunters Point at this time?

A. No, sir.

Q. Do you know what capacity they are working at?

A. No, sir.

Q. What capacity is your yard working at at the present time?

A. At the present time the repair yard is pretty near up to capacity for a few days.

Q. What has been your general experience over the past year? Have you worked at capacity for the last year?

A. I would say at about seventy-five per cent capacity in the old yard, in the east yard for repairs.

Q. You were able to take care of all the work that is brought to you, are you not, or has been brought to you in the last year?

A. At the present time, yes.

Q. Do you recall that, from looking at the exhibit and from [274] your general knowledge of the yard, that Oakland Dock and Warehouse and company only purchased the outfitting portion of the Moore Drydock West Yard?

A. That is what I understand. I have nothing to do with that part of the business of the yard so I can't answer definitely. That is only my understand-

(Testimony of Sewell A. Knapp.)

ing, that they own the portion indicated in this map, the west portion.

Q. That is the Western Pacific property still held by the Government?

A. That is what I understand.

Q. Is it possible, Mr. Knapp, to use the west half of the yard purchased by Oakland Dock and Warehouse Company as a shipbuilding facility without the east half of the Western Pacific lease?

A. For shipbuilding proper, no, sir, you would have to revamp that yard to build ships there if you didn't have the Western Pacific property.

The Court: What was that last answer?

A. If they wanted to build ships there they would have to have the Western Pacific property or rebuild the yard to be able to build ships on that west side. You have no building slips there.

The Court: How about the repair of ships?

A. Repairing ships, you can repair and convert ships there and overhaul them under the present set up. [275]

Q. (By Mr. Neblett): You could without dry-docks? A. Yes.

Q. That would be the interior and superstructure, of course, only?

A. That is right. They are doing that, your repair of ships along the waterfront right now and they have no drydocks. I could mention two or three names.

Q. This along the west half of the yard purchased by Oakland Dock and Warehouse Company,

(Testimony of Sewell A. Knapp.)

this was designed as a ship building plant, isn't that so?      A. Yes.

Q. It has never been used for anything else by the Maritime Commission or the Government, isn't that right?      A. That is right.

Q. Ships were built there during the war?

A. That is right.

Q. There was never anything repaired, any repair work or anything done there by the Government that you know of, was there?

A. A lot of repair work.

Q. You worked there during the time the plant was active, or most of the time, did you not?

A. Yes, sir, from the time the Maritime Commission took it over until the yard was closed.

Q. Do you recall, Mr. Knapp, offhand when the yard was closed? [276]

A. In '46, I think was the year, '46.

Q. Was it closed right after the war in '45?

A. No. Considerable work after that.

Q. It closed——

A. 1946 is about the date we left over there, I think you will find.

Q. I can give you the date that the yard was declared surplus by the Maritime Commission, June 20, 1946. That would be approximately the date they quit work, approximately?

A. Somewhere around there. They quit work around the first of the year.

Q. Do you recall your company having been made an offer to purchase both the east half and the

(Testimony of Sewell A. Knapp.)

west half of the Moore Drydock Company west yard in 1947?

A. I don't know anything about it. All hearsay. I have nothing to do with that, so it is only what I hear.

Q. What do you think would be the value in 1947 of the entire east and west yard, I mean the east and west half of the Moore Drydock Company west yard?

A. In dollars and cents?

Q. Yes. A. I haven't the faintest idea.

Q. Would it influence your opinion on that subject if you knew that Moore Drydock Company offered \$500,001 for the whole place on June 10, 1947? [277]

A. It wouldn't influence me one way or the other. I don't know anything about the dollars and cents of it.

The Court: The witness said he had no opinion, so you couldn't influence his opinion.

Mr. Neblett: I think your Honor is right. He said he didn't have anything to do with that.

Q. You are the technical man, are you not, Mr. Knapp?

A. Production.

Q. I mean production man. You are not in the business end of it?

A. No, sir.

Q. Have you found the tools and equipment that you have testified to as being hard to get during the war are hard to get now or are there plenty of them on the market now?

A. Well, I can't say definitely on that. There are

(Testimony of Sewell A. Knapp.)

tools I know we have been trying to get for the old shop that take a number of months to get them.

Q. Well, I will ask you—this is largely repetition, but you said during—you seem to know a great deal about it, so I will ask you again, this shipyard, the west end, was designed for a ship building plant, we agree on that. A. Yes.

Q. And I ask you again if you will testify—well, I have asked that. That is repetition. You have already told me, you have already answered the question it couldn't be used for [278] a shipbuilding plant without revamping.

A. Without that Western Pacific piece or revamping the yard, the portion the Oakland Dock people have now.

Mr. Neblett: That is all.

### Redirect Examination

By Mr. Peckham:

Q. One question: The portion now owned by Oakland Dock and Warehouse Company the company used for shipbuilding and outfitting?

A. For shipbuilding.

Q. For repairs?

A. Yes, for repairs and outfitting.

The Court: Let me ask you something, Mr. Knapp. When you build a ship, the first thing you do, you build a hull and it comes off the ways, is launched. A. Yes.

Q. Then you stop to put on the superstructure



(Testimony of Sewell A. Knapp.)

and put in the interior everything that has to be done?      A. That is right.

Q. Could those latter operations be done at this place?      A. Yes, could be done.

Q. The only thing you couldn't do is make the hull and launch the hull?

A. Which is a pretty big portion of the work.

Q. What?

A. Which is the large portion of the work of building ships. [279]

#### Recross-Examination

By Mr. Neblett:

Q. Are you familiar with the condition of the yard, I mean the piers, the crane rails and tracks, I call them, and general condition of the machinery in the yard at this time?      A. No, sir.

Q. What is the life of piers of the type that were built in this yard, do you know, Mr. Knapp, assuming that it was built of green piles?

A. I don't know how this yard is constructed, whether it was built of green piles or whether permanent piles under the floors and creosote, or not. I am under the impression those are creosoted, but I am not sure. I had nothing to do with the construction of the yard at all. I am not familiar with its present state.

Q. What is the general life of a yard of that type, the life, average life, before you can go to work?

(Testimony of Sewell A. Knapp.)

A. In the yard I am in now, we have piers there twenty and twenty-five years old and still using them.

Q. Just take the whole yard as it was built by the Maritime Commission there before the war, what is the general average life of a yard of that kind?

A. I don't know how the yard is built, if it was built as an emergency yard or if it was built for permanency. That is what I don't know. I had nothing to do with the building of [280] the yard itself.

Mr. Neblett: That is all.

The Court: Any further questions?

Mr. Peckham: Just one question.

### Redirect Examination

By Mr. Peckham:

Q. Mr. Knapp, from your experience in ship-building have you ever known ships, that is, hulls to be launched and the superstructure and outfitting done at another place? A. Yes.

Q. That isn't an unheard of thing?

A. During the Second World War considerable of that was done.

Mr. Peckham: No further questions.

The Court: All right, step down.

(Witness excused.)

The Court: Any further evidence now on this matter?

Mr. Peckham: No, there isn't, your Honor. With the one suggestion that I may offer that folder in evidence.

The Court: Yes. Anything further in an evidentiary way from you, Mr. Neblett?

Mr. Neblett: I think I will have to recall Mr. Deede for a few questions. [281]

RALPH G. DEEDE

recalled by the Defendant, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Neblett:

Q. I show you a document dated April 8, 1949, and headed "War Assets Administration, Region 10, 1000 Geary Street, San Francisco 9, California; chronological summary of events since assignment of Moore Drydock Company, West Yard, Oakland, California, M-California-174, to War Assets Administration, Region 10 Office, for disposal," and ask you if you are familiar with that document, Mr. Deede? A. Yes, I am.

Q. That was prepared by your office?

A. That is correct.

Mr. Neblett: We offer this document in evidence, your Honor, on behalf of the Defendant.

Mr. Peckham: Well, I haven't objected to this proceedings because I know your Honor would like to have all the circumstances; but I fail to see the materiality or relevancy or competency of this document. It is a chronology of the events that led up to the, apparently, the acceptance of the Oakland Dock and Warehouse Company by them and the respective amounts of money that were paid.

(Testimony of Ralph G. Deede.)

The Court: Who made it?

Mr. Neblett: Made by Mr. Deede's office, made by his office here, the Regional office. [282]

The Court: I will admit it.

(Chronological summary of events, etc., was admitted into Evidence as Defendant's Exhibit F.)

Mr. Neblett: Referring to Defendants' Exhibit F, just admitted into Evidence, would you look at item 7,I, under that, and read it, will you please? That is Item 7,I.

A. "Moore Drydock Company, Oakland, California, offered to purchase for \$500,001, all cash on closing."

Q. That offer was made, according to this document on June 10, 1947?

A. I wouldn't know. I wasn't there at that time, but according to that document that is what is stated.

Q. June 10, 1947. A Security Clause wasn't on the property then, was it?

A. I wouldn't know. I wasn't there at that time. I had nothing to do with the yard, didn't know about it, but I am sure the Security Clause was not there because it was placed on there at a later date.

Q. That was part of the yard including the Western Pacific lease?

A. I wouldn't know.

Mr. Neblett: That is all.

Mr. Peckham: No questions.

(Witness excused.)

The Court: That is all the evidence now that you have [283] to offer?

Mr. Neblett: That is all.

Mr. Peckham: Yes.

The Court: All right, will you continue then, with your argument on the question of how these amendments to the deed affected conditions in the bill of sale? That is what I am interested in. As I understand your contention—is this a fact?—that the bill of sale refers to the quit claim deed, in a sense it was all one transaction, and that when the amended deed was made, since it enabled you to keep all the land and build what you wanted on it, it therefor was inconsistent with the provisions of the bill of sale, and therefore the provisions of the bill of sale were in a sense repealed, is that correct?

Mr. Neblett: That is correct, about as far as I have gone at the present time.

The Court: Yes.

Mr. Neblett: I haven't gone any further than that up to now. I handed your Honor the three instruments and the law with which we are concerned here and I would like to call your Honor's attention to the original quit claim deed, to start with. If your Honor will turn to page 3 of it, the Court will see that the so-called restrictions "and subject to the following covenants and conditions by the grantee herein to be performed," on page 28 of the direction of the Munitions [284] Board, all of that deed down to and including the words "War Assets Administration" in paragraph 15 on page 6 were stricken out and rewritten beginning with this mat-



ter on page 1, just ahead of paragraph 1 on the amendment or modification, "and subject to the following conditions and covenants by the grantor and the grantee herein to be performed." The word "grantor" is set in there, and that was set in, your Honor, it is perfectly obvious and the Government has an option to lease upon certain terms and conditions the facilities the Oakland Dock and Warehouse Company was building; and the reason the word "grantor" was inserted in there and the reason why the Oakland Dock and Warehouse Company was required to execute the modifications was to get away from the statute of frauds that would make the option to lease good by signing by both parties. In other words, all these restrictions amount only to an option to lease the property. I think that is generally conceded by everyone that has studied the question. Certainly that is the idea of the Department in Washington.

Now, we went in to ask, as I told the Court yesterday, that the Security Clause be removed entirely on the ground that it was void. That was the main point we made. But we felt—we considered very seriously bringing suit to quiet title, but we felt we were not able to bring suit to quiet title until such time as we had exhausted our administrative remedy under paragraph 3 of the old deed. So we went in under [285] that and the motion was denied and, as we pointed out to your Honor yesterday, the Munitions Board opened the door for us to come back and ask for modifications which were satisfactory to us. In the discussion that went on, it is perfectly

apparent from the deed that we came down, as shown by the article which I read your Honor the other day from the Munitions Board's report, made at the direction of the Secretary of Defense to Congress on April 1, 1950, we came down to the question of sites only, that is, the site for shipbuilding or a plant in time of war.

Your Honor will note that there are some very important things in this amendment which do not occur in the original. In the first place, it is apparent from the evidence that has been introduced here, and was apparent from the evidence which we had before the departments in Washington, that this plant had never actually been designated for disposal purposes such as in Public Law 883, and in order to set that question at rest for all time the Munitions Board redesignated this property, as shown by the evidence, as a terminal warehouse facility. It isn't designated now as a shipyard or shipbuilding plant. It is designated as a terminal warehouse facility, shown by the letter from Captain Christmas. So that is what we were talking about. That is what we were there for. We realized that there was no shipbuilding or ship repair, and we realized and fully discussed among ourselves—I don't [286] say that, I don't claim by what I am saying now that Admiral Klein, the officer who testified here yesterday and today, before ever agreed with us on anything. He said he didn't, and when he said that he was minimizing what the situation was. He never did agree with us. But this was made for the Munitions Board.

Paragraph 1 sets that at rest. This property, the site only, was designated. The machinery has never been designated but, "the granted premises hereinafter referred to as 'plant' constitute a part of the National Industrial Reserve under Public Law 883, 80th Congress, approved July 2, 1948, and have been designated for disposal subject to the provisions of the National Security Clause. This, and the following provisions constitute the National Security clause of this quit claim deed."

No question about that designation having been made by the Munitions Board which, according to the Secretary for Defense, is the body delegated by him to do this job.

Old paragraph 1, which was found to be unsatisfactory by the Munitions Board and by us, is that, "the above-described realty hereinafter referred to as the 'plant' is considered a War Reserve Plant and, as such, will be of vital interest to the United States of America in time of emergency."

That is no designation. That is just a recital of something. But this is a statement that it has been so [287] designated, and designated as what? The latter part of the deed shows it was designated as a terminal warehouse facility.

Now we go on. Here is something that I think the proof of the Government is absolutely lacking in. It is certain that no one has any authority here except the Secretary of Defense, and we see in paragraph 15 of the new deed that there is a lot of talk about secretaries and who has jurisdiction and who does not have jurisdiction in the old deed, whether

the Navy has or someone else. The Navy has no jurisdiction. Even though the old deed says the Navy does have jurisdiction, if your Honor please, you can't confer jurisdiction by consent nor can powers be conferred by consent. Nobody can confer—a body such as the Navy, or department of Government such as the Navy and a private person cannot confer jurisdiction on the Navy by contract. That is a well established principle. No necessity for my going into it. Public Law 883 places responsibility directly on the Secretary of Defense. Even the President of the United States hasn't under that law any power whatever over the Secretary of Defense's disposition any more than the President of the United States has any power over a decision of the Federal Court. None.

The Secretary of Defense is the appointed officer by Congress. The deed defines what "Secretary" means, and paragraph 14——

The Court: Are you talking about the regular deed or [288] amendment?

Mr. Neblett: The amended deed, your Honor.

Paragraph 14 defines that as "used in this agreement the term 'Secretary' shall be deemed to refer either to the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, and to their respective duly appointed representatives."

The only duly appointed representative—I don't know whether the Secretary of Defense has any authority, any power to delegate authority, but assume he has. He delegated to the Munitions Board. He did not delegate it to the Navy. There has been



no showing here, and that is an absolute break in the Government's proof, there has been no showing that the Secretary of Defense even knows about this suit, or that the Munitions Board knows about it. The only person that has been presented here as fostering this suit in the name of the United States of America is the Navy Department, and it has no authority because the Secretary of defense is the only one who can authorize it. Whatever the Navy has done about this thing would have no more effect that I could have done as an officer of the Army, which I was for a long time, and an Officer in the Air Forces.

Now, the modified quit claim deed, paragraph 2 in the old and the new deed are similar. That is the reservation that was in it for the twenty years. [289]

Paragraph three in the new and old deeds are similar, or about the same.

Paragraph four in the new and the old deed are somewhat different because they state that the dormant estate may be activated by the Secretary, meaning the Secretary of Defense "at any time prior to the expiration of the twenty-year period by written instructions to the grantee whenever, in the opinion of the Secretary, considerations of National Defense so require. In the event the dormant estate is so activated, the United States shall have the right to full possession and use of the plant."

Paragraph five is somewhat similar, but five is quite different. Five in the new deed: "When, in the opinion of the Secretary, it becomes necessary for the United States of America to utilize, in ac-



cord with the provisions of Public Law 883, 80th Congress, the productive capacity of the plant for the purposes of National Defense, the United States of America will undertake to negotiate a satisfactory contract with the grantee," and so forth. Why was that put in there in that way? Because no one can foresee at this time what kind of ships will be built in another war. Nobody can foresee that. So it is obvious that the Navy Department made its recommendations to the Munitions Board, which I have never seen. We were never favored with seeing that. And the Munitions Board finally granted and required they so amend [290] this deed, because it was much more desirable to them, to the Department of Defense, to have a live, going concern there which might be used for something such as warehousing, or such as the manufacture of guided missiles, or something of that sort.

It was known that the condition of the yard was very bad, and it was known, also, that the facility had been split into two parts. And there was grave doubt, and there is still grave doubt, whether the Western Pacific lease is void or valid and that the Government has no interest in that property whatsoever. Therefore, as Mr. Knapp testified here this morning, they had two pieces of property standing side by side, a cloud regarding title of the Government on that side, and a piece of property here, as Mr. Knapp says, that could not be used for shipbuilding unless the plant was entirely revamped. I forgot to ask him the question whether it is too small for a shipbuilding plant, but I suppose the

Court will take general notice of whether it is big enough in view of the other evidence in the case. But it could not be used, anyway. This half could not be used anyway without the Western Pacific lease without entirely revamping of it. Not for ship-building. That is the testimony of the Government's own witness.

Paragraph six in the old and new deeds are somewhat similar except that it says, "the grantee, upon receipt of written notice that the dormant estate has been activated, [291] will immediately proceed, subject to the availability of labor and materials, to remove improvements, structures, alterations, machinery and other equipment, in accordance with the directions and instructions in such notice. Such action will be completed in the shortest possible time but in no case in excess of 120 days from the date written notice is received."

There is a point. That was written so that the grantee's machinery would have to be taken off of there, after we have built up the plant, after we are allowed to build it up as a terminal warehouse facility. the Government wouldn't come in and tear down all this property and revamp this as a shipyard.

This is an acceptable document. So we state to your Honor today, having made a document in the highest good faith in which we had all these things we feel, which we contended throughout, as shown by the evidence in this case, that the provision of the bill of sale wouldn't matter, because without this support of the old quit claim deed there was no

way to activate it and it wasn't necessary to revise it. And that was apparent from the beginning. It is shown in the writings, shown in the affidavit of Mr. Agostini, that we have a contract and we are trying to carry out the contract and the Government is here trying to get an injunction against us from carrying out the contract made with us. We haven't breached the [292] contract. The Government has breached it by bringing this suit, and it is being brought by somebody that has no authority namely the Navy Department. I challenge the Government that the Secretary of Defense or the Munitions Board has had anything to do with this suit.

Mr. Peckham: The Attorney General is authorized to bring this suit.

Mr. Neblett: I would challenge the Attorney General to show it if I could. I can't challenge him. He isn't here. But Counsel for the Government represents the Attorney General.

Anyway, if the Court please, that is our situation. We have a contract we are trying to carry out, and we can't carry it out if they are going to allow the machinery, tools and equipment to clutter it up. The piers are falling in the water, settling down. The water lines have gone to piece high pressure air lines. Cranes, as Mr. Arnaud said, are settling so they can't be moved and they are both in the way and of no value to anybody.

That is the reason this was made in that form. We have to remove improvements, fixtures, alterations, machinery and other equipment. We have to remove it. Why not remove it now and build the

place up so that it will be of use to the community and the Government and then——

The Court: Your position is that this deed is inconsistent with the bill of sale, the second deed, and that therefore it [293] repealed the conditions and provisions that the Government is claiming still prevail in the bill of sale? That is in essence what you are claiming, isn't it?

Mr. Neblett: That is true, your Honor.

The Court: And having executed this amendment under conditions such as it was, then it made the conditions of the bill of sale *functus officio* and you shouldn't be required to carry it out.

Mr. Neblett: Your Honor has the correct understanding of our position.

The Court: Yes, I think I understand it. Have you anything to say on this subject, Mr. Peckham?

Mr. Peckham: I think so, your Honor. I would like to have some time to answer the arguments of Counsel. Counsel has had considerable time.

The Court: Yes, I understand that.

Mr. Peckham: Would you like me to begin now?

The Court: Well, if you prefer to wait until this afternoon it is all right with me.

Mr. Peckham: Well, perhaps——

The Court: I have to leave here at twenty-five minutes after three. I think you gentlemen, if you take that much time, will have had ample time on this discussion.

Mr. Peckham: Yes, I assure I won't take that much time.



The Court: I think I have some of these things drilled [294] into my mind.

Mr. Peckham: Your Honor, at this time I would like to offer in evidence the folders.

The Court: That is the one you referred to before?

Mr. Peckham: Yes.

Mr. Neblett: We have no objection to it, your Honor.

Mr. Peckham: Plaintiff's Exhibit next in order.

(The folder was marked Plaintiff's Exhibit 6 in evidence.)

The Court: Do you wish these documents back, Mr. Neblett?

Mr. Neblett: If your Honor wishes to retain them until the argument is completed——

The Court: Yes.

Mr. Neblett: I think that will be more efficient. We want them back after the case is over, that is all.

The Court: We will recess until 2:00 o'clock, but I want to leave here at twenty-five minutes after three.

(Thereupon this cause was adjourned to the hour of 2:00 o'clock, p.m.) [295]

Thursday, June 22, 1950, 2:00 o'Clock, P.M.

The Clerk: United States versus Oakland Dock and Warehouse Company, further hearing.

Mr. Peckham: Ready for the Plaintiff.

Mr. Neblett: Ready for the Defendant.



Mr. Peckham: Your Honor, may it please the Court, the principal issue to which Counsel has addressed himself in his closing argument is the question of the effect of the modification of the covenants and conditions of the original quit claim deed.

I believe your Honor is familiar with the Government's position that the proposed modification was a modification simply and solely of the original quit claim deed which has to do, though there were references incidentally to the personal property that was being conveyed by a separate instrument, executed at the same time, which had to do solely and exclusively with real property.

I think we ought to reorient ourselves and re-focus our vision of this entire transaction and the subsequent procedures that have followed.

Here we have a case, as testimony has shown and as Counsel has stated in his presentation from time to time, of a facility which was declared surplus being disposed of. It was known all during the time prior to this particular sale [296] that this particular facility was to be sold subject to the National Security Clause. There has been testimony that that fact was made known in the discussions that continued at the time of the purchase by the Oakland Dock and Warehouse Company.

Counsel has indicated from time to time how, after the sale took place, the Company, through its representatives has been attempting to have the National Security Clause lifted as to the entire property. They have made repeated attempts to have it—either have it lifted completely or, when that

failed, to have a modification. They desired to utilize the yard in a way that apparently was not permissible under the first quit claim deed apparently in order to, in balancing these factors, the factors of permitting the widest latitude in the use of the yard so that they might use it and have some economic advantage to them and the factor of the value of preserving the yard for the purpose of National Defense, the modification of the quit claim deed was permitted.

The modification of the National Security Clause as it affected the real property permits a certain use of the property as is shown in paragraph 9 of the modification. It states, "except as otherwise provided herein, the grantee, during the twenty-year period, may alter, improve, add to or extend any or all of the buildings and structures now on the property, erect additional buildings and structures on all or any part of the premises not now occupied by the permanent [297] buildings (main structural frame of metal, concrete or masonry) and the piers and replace any of the piers and nonpermanent buildings and structures with piers and buildings or structures having equivalent capacity."

It says "except as otherwise herein provided," they may do that. The first sentence of that same paragraph 9 in the modified quit claim deed says that "during the twenty-year period, the grantee will not make any alterations, improvements, additions or extensions to the buildings and structures or erect any new building or structure on the premises which would diminish the capacity or impair

the utility of the plant for the purpose for which it was designed, unless the plant can be restored to efficient operation for its designed purpose within not to exceed 120 days.”

So here from the first of the documents we see what was done. In an attempt to accomodate the Oakland Dock and Warehouse Company to utilize this yard for its economic advantage certain latitude was permitted. However, the policy that is imposed in the National Security Clause is preserved in this modification as to the real property. So that the National Security Clause is not only still in effect as to the real property but, as I will go on to show, it is still in effect as to the personal property sold under the bill of sale. There is nothing in the proposed modification or alleged quit claim deed which is a release of the conditions and [298] restrictions which are stated in the bill of sale. That subject which would be by the remotest implication an attempt to permit the Oakland Dock and Warehouse Company to utilize this yard (I take it for a terminal warehouse) was apparently in mind when this modification was made, but there is nothing in here which says they can sell off the tools or machinery, or that releases them from the conditions against disposing of the tools and equipment.

Should you take the view that Counsel advances, that this modification supersedes both the bill of sale and the original quit claim deed as to the imposition of the National Security Clause, I refer your Honor to paragraph 14 of the modification which defines the term “plant,” which is used

throughout the modified quit claim deed, and the term "plant" refers to "the property sold, conveyed and transferred hereunder and to any part or portion thereof."

That term, with that portion of paragraph 9 which states that the plant must be not—must remain in such a state that it can be put into action within 120 days for the designed purpose for which it was built would certainly not indicate that it was intended the machine tools and equipment, which are a vital part of the plant if it is to go into operation within 120 days, were—that is, was to be removed as to the equipment and machinery.

While we are talking about this, Counsel this morning [299] made a general assertion that the facility, the Oakland Dock and Warehouse Company plant there, had now been designated as a terminal warehouse. Well, there has been no evidence to that effect. He refers to a letter, which was admitted into evidence, from Captain Christmas to the Oakland Dock and Warehouse Company or its representatives. In that letter Captain Christmas simply referred to a conference he had with Mr. Mayock, Mr. Welburn Mayock, an associate of Colonel Neblett's, and states that Mr. Mayock made a suggestion that he submit a proposal to have the designation changed, and that in view of the suggestion that such a proposal was to be submitted, that Captain Christmas was either answering another letter or wasn't going to answer another letter.

In any event, it isn't a letter designating the yard



as a warehouse facility. In fact, in the report to Congress and the testimony and all the evidence presented the yard still remains designated as a ship repair or shipbuilding yard which is necessary in time of National emergency or National Defense.

Counsel has from time to time stated that the Department of Navy has brought this suit. Well, of course technically the United States Government has brought the suit and it has been brought through the local officials of the Attorney General of the United States. Then, Admiral Klein has testified as a competent and experienced officer in the United [300] States Navy whose business it has been for a great number of years—whose business it has been, the examination and planning of the ship yard facilities available for building ships in time of National emergency. We were fortunate enough to have Admiral Klein stationed here inasmuch as he has been in Washington in the Bureau of Ships at the time when planning mobilization, in which plans this particular yard played an important part, were formulated.

We were shown the designation of the plant in many ways, and the Department of Navy, being the Department of National Defense established, or the Department of Defense which is concerned with shipbuilding, is the one that makes the recommendation and the one to which the plant, when it is placed in the National Reserve, is assigned for the purposes of inspection and constant review as to requirements for National Defense. That recommendation was made by the Bureau of Ships and the



Department of the Navy, which has within its body the men who will be charged with the responsibility of defending this country in time of war at sea.

There have been constant assertions made by Counsel in the nature of substitution of his judgment as to what is needed in time of war. Now I think in a proceeding of this kind, your Honor, that we who are laymen, so to speak, in regard to matters of National Defense, must rely upon those officers and those bodies of the Government in the Department [301] of Defense, and including the Munitions Board, whose responsibility it is to determine what is necessary and who know the type of ships that are intended to be produced at the time of another emergency.

Just looking over some of these assertions made this morning by Counsel, there has been no determination here in this proceeding nor in any other proceeding that there is any cloud on the lease of the Government from the Western Pacific Railroad Company. As far as the Government is concerned, the yard can be used as a unit and the National Security Clause has been imposed on the yard to be used as a unit. Even if it couldn't be used as a unit, that was temporary only, and both yards could be used for outfitting and for ship repairing. Both could be considered essential in time of a National Emergency.

Counsel has referred from time to time to the reports of the Munitions Board. I would like to refer your Honor to the 1949 report in which—well, submitted April 1, 1949, in which there is consider-

able discussion of this particular plant and it is stated it is one of the best locations on the Pacific Coast for the purpose for which it was designed. This determination has been made by agencies of the Government whose business it is to make such determination.

Mr. Neblett: Pardon me, did I understand you to say, Counsel, that that was the 1949 report? [302]

Mr. Peckham: It is the April 1, 1949, report of the Munitions Board to the Congress, Plaintiff's Exhibit 3-A.

It speaks in the appendix, Exhibit 16 on page 239, it says that the Moore Drydock Company yards—it says, “maintained in National Industrial Reserve with full N.S.C. restrictions. Considered one of the best facilities on the West Coast for its purpose, necessary to maintain in the event of a future emergency.”

Counsel has made the point through questioning of witnesses—has attempted to make the point through questioning of witnesses and has made the point in his oral discussion, that the yard is, in effect, falling apart; that the piers of the yard are going to pieces, to use his language. Under the terms of the National Security Clause in both the bill of sale and the quit claim deed it is the responsibility of the Oakland Dock and Warehouse Company to maintain that yard. If it is going to pieces it is because the maintenance has not been adequate, and certainly the defendant company should not be permitted to take advantage of its own breach of

terms and conditions imposed upon the sale of this property in order to justify their position now that the yard would not be useful in National Defense because of the deterioration that they contend has taken place.

The recital in the first deed of trust——

The Court: You mean the deed, don't you? [303]

Mr. Peckham: Deed, yes, giving the power to activate the so-called dormant estate, the recital of the yard being a part of the National Reserve and giving the Secretary the power to activate the reserve, or, rather activate the dormant estate, was simply—it just as much pertains to the bill of sale, or, rather the same provision in the same modified quit claim deed that was found in the original deed as the designation of the plant and as the power of the Secretary to activate it in time of National Emergency would still be appropriate, taken together with the provision in the bill of sale where there was just a recital there to show that the object of the imposition of the National Security Clause in the sale of both types of property was to keep them as one unit. The whole general purpose of placing a plant that is not to be disposed of as surplus is to preserve it as a National Emergency so that it could be activated and put into operation within 120 days. Certainly, in order to do that it is necessary that machinery and machine tools, particularly the heavier type of machine tools, be kept available.

Yesterday when Mr. Arnaud was testifying as vice-president of the defendant company there was

considerable testimony about the prospective lease, which is not binding on either party, but is simply in the stage of negotiation, and there was testimony that the restraining order which was issued by your Honor has, to use Mr. Arnaud's words, put the kibosh on the negotiations. There is no reason that that [304] should have occurred. The Company is free to lease its property as it has been doing, subject to the National Security Clause. In any argument addressed or directed to balancing out the conveniences, there is certainly no detriment going to occur to the defendant company as a result of the continuation of the restraining order in the form of a preliminary injunction. They are free to go ahead and lease the property. The thing that they are not free to do is to continue to sell the large amount of machine tools that are listed in Plaintiff's Exhibit 5, which have been testified to as being so essential to the operation of the plant that the sale of a great proportion of those tools would materially reduce the capacity of the plant to produce what it is designed to produce.

Counsel has made considerable point of the delegation of authority, and I am not yet clear exactly how he objects to the designation or delegation that has taken place. There is in the—once again referring to the report of Congress of April 1, 1949, on the National Industrial Reserve, there is set forth in the appendix as Exhibit 19, page 267, part three of the regulations under which the Munitions Board operates, and the title of part three is "Delegations of Authority," and there is there set forth the



entire delegation of authority, with reference to the appropriate section of the Federal register where the delegation made by the Secretary of Defense Forrestal to the Munitions Board of his duties under the National [305] Industrial Reserve Act. That is 13 Federal Register 4576.

The Court: That is August, 1948, isn't it?

Mr. Peckham: I believe this was made the day after the Act, July 3, 1948.

Then there is also contained in the United States Code the provisions establishing the Munitions Board, Title Five, 171-H of the United States Code, Annotated.

There are set forth the powers and duties and functions of the Munitions Board, and also provisions establishing it, and it states here——

The Court: What volume is that?

Mr. Peckham: Title Five, Section 171-H.

“The Board shall be composed of a Chairman, who shall be the head thereof, and who shall, subject to the authority of the Secretary of Defense, and in respect to such matters authorized by him, have the power of decision upon matters falling within the jurisdiction of the Board, and an under-secretary or assistant secretary from each of the three military departments, to be designated in each case by the Secretaries of their respective departments.”

Once again, it states here: “(c)”—this is Section 171(c), “Subject to the authority and direction of the Secretary of Defense, the Board shall perform



the following duties in support of strategic and logistic plans and in consonance with guidance in those fields provided by the [306] Joint Chiefs of Staffs, and such other duties as the Secretary of Defense may prescribe," then enumerates such duties and functions, much of which pertains to the planning for military aspects of industrial mobilization and such problems as those with which we are not concerned.

This would come within the jurisdiction of the Munitions Board in that regard.

As to Counsel citing the Kansas City Stockyard cases, Morgan against United States, those cases arose out of proceedings taken by the Secretary of Agriculture pursuant to appropriate action to fix rates. Those were in the nature of quasi-judicial proceedings of an administrative nature. Those procedures affected existing property rights of persons at the time of adjudication by the Secretary or by his representatives. They were questions as to whether or not statutory procedures were followed, and led to whether or not due process was accomplished by the way in which decision was ultimately made by the Secretary, and that there was no oral argument before him until some other time. The real point is that when the determination in this case was made it did not at the time it was made affect any property rights of Oakland Dock and Warehouse Company. It was made long prior to the time that they bought this yard. It affected the yard, but at the time that it was owned by the United States.

And pursuant to the provisions of the Constitution, [307] Article Four, Section Five, which states it is an exercise of Constitutional Power of the Federal Government to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, the same question does not arise that arose in that particular case. It is an entirely different matter in that there wasn't a quasi-judicial proceeding of an administrative nature herein.

The Court: What have you to say as to that point that they make that the amendments to this quit claim deed were such that they excluded the possibility of the use of these machine tools and cranes, and so forth, on the ground, and that therefore they sort of by implication repeal the conditions in the bill of sale?

Mr. Peckham: Well, I would go back again, your Honor, to Section 9 of the modification which shows that they would not make any alterations, improvements, additions, or extensions to the buildings and structures which would diminish the capacity of the—diminish the capacity or impair the utility of the plant for the purpose for which it was designed unless the plant could be restored to efficient operation for its designed purpose within not to exceed 120 days.

In other words, they were permitted to make certain changes and alterations, but they were limited in making those by that provision in this way, that they couldn't so radically change it that it couldn't be restored in 120 days. I believe even

the conditions of the original quit claim deed contain [308] a provision that they might move the machine tools around, but they could not dispose of them or by dismantling them, moving them around, reduce their use; but, in other words, that they were—the main intent, of course, of these instruments was to keep the yard in such a way that it could within 120 days be put back together again and restored and used for the purpose for which it was designed.

Your Honor I know is very familiar with the evidence in the case. I don't think it is properly a matter for me to recite the evidence that has been produced, that would go to a consideration of the different factors that must be weighed when a decision is made as to whether preliminary injunction will issue.

As we have said many times during these proceedings, the question of the adequacy of our remedy at law is not one to be considered from a monetary point of view. For that reason I did not examine the accountant at any great length on the financial responsibility of the corporation. The question is whether or not the Plaintiff—whether or not the machine tools that have been sold——

The Court: I understand that.

Mr. Peckham: ——could be restored in 120 days.

The Court: I am wondering about one thing, that is, the provisions in the bill of sale, I think they prescribe a limit of ten and twenty years, don't they? [309]

Mr. Peckham: Twenty years on the personal property.

The Court: Well, the only point that is bothering me is that if sufficient time elapses from the time—if sufficient time elapses, some of the machines and tools might be obsolete and might not perform the function that they were originally intended to perform, or may be superseded by other better equipment so that the plant would have to be rehabilitated and new tools used and these discarded. Of course there is nothing said in these documents about it, but there was some testimony to the effect that the underpinning of some of these railways for the cranes is really no good any more, damaged by water and rotted, and they really couldn't serve their purpose anyway, and therefore the cranes that are used on them wouldn't serve their purpose, either, and therefore these violations against the inhibitions against the sale wouldn't be hurtful to public policy anyway.

Mr. Peckham: Well, your Honor, in that regard the Bureau of Ships has been assigned the responsibility of making an annual inspection to determine the condition of the yard. Also in that regard, there are contained in the regulations of the Munitions Board in this report to Congress of April 1, 1949, at page 298, Section 3, Sub-section 3-601, "Whenever the Munitions Board shall determine that the retention of the productive capacity of an excess industrial property in the National Industrial Reserve (including a lesser part or [310] interest than the entire property) is no longer essential to the



National Security, it will authorize the relinquishment or waiver of a part or all of the provisions of the National Security Clause applicable to such property.”

They have a procedural remedy there with the Munitions Board to have the National Security Clause lifted at such time as they can establish this deterioration has reached a point where it wouldn't be usable in case of National Defense, and if by itself could take the initiative and so waive the National Security Clause.

Then I might go on further on that point, your Honor, to say that apparently despite the great deal of negotiation that has been going on prior and subsequent to the purchase of this property in Washington, that the Oakland Dock and Warehouse Company, when they were not able to have the National Security Clause lifted as to the personal property, became so impatient in their effort to dispose of it that they desired to go—that they went right ahead and started selling the property without getting any, either judicial or certainly not administrative, determination that they were relieved either because the yard had deteriorated or because of modification of the covenant. They chose to go ahead and sell off this property.

There has been considerable testimony here as to the value of the yard. Mr. Deede testified that the value placed upon the yard without the National Security Clause was [311] \$2,600,000; that this company was able to purchase this yard for \$1,200,000, approximately. Certainly the cannibalization in the



selling of the yard piecemeal, in view of the fact that the Government has already paid for this National Security Clause by a \$1,400,000 reduction, and proportionate reduction in regard to the personal property, I submit, your Honor, that certainly that would, I think, somewhat shock the conscience of the chancellor in an equitable proceeding. In regard to the balancing of the conveniences, the detriment here is a detriment to the public. The cannibalization of this plant would be detrimental to the country in case of a National Emergency. There is no benefit to the public by not granting the injunction. There are those cases, as your Honor knows, where a nuisance is attempted to be enjoined. Oftentimes if circumstances are such that the public would be harmed by closing down of a great plant because of inconvenience or detriment to one individual, equity will not grant an injunction. But here we have the reverse situation. If the injunction is not granted the public will be harmed and of course the corporation will not be benefitted. And in this case where they have already, in a sense, been paid for the National Security Clause, no great detriment is being imposed. They are free to go ahead and lease their property to Lyco or get other leases. All the Government asks is that they comply with the provisions of the National Security Clause. [312]

Well, there are a great many other things that Counsel has said from time to time that I could comment on, but I think probably your Honor by this time has the situation in mind.

The Court: I should have.

Mr. Peckham: If there is any question you would like to ask?

The Court: No. Have you anything further to say now on this subject, Mr. Neblett?

Mr. Neblett: Just one short statement, your Honor.

I think that Counsel was in error when he claims that something about the delegation of authority and this setting forth of it has been done here. We do not claim, of course, that the Munitions Board does not under the new law adopted in 1947—not 1949, not the rule that Counsel read from—adopted in 1947 can be delegated authority to fix these plants, but it couldn't have been done in 1948 before the adoption of these amendments.

But the main thing I wish to address my remarks to at this time, following up what I said, is that it is obvious from this agreement, modified as it was on February 28, 1948, with the concurrence of the Department of Defense acting through the Munitions Board and with instructions to the G.S.A. on Geary Street, the Regional Office, that the thing the Munitions Board was interested in was the site and the site only. I hope your Honor will pardon me for going back to the document which was introduced in Evidence by Counsel for the Government. I refer now——

The Court: That is the 1950 report?

Mr. Neblett: Yes, your Honor.

This was made about the time that this deal was put through. I might say to your Honor with some

fear and trepidation that I may be claiming too much credit for that, but I would say that the work that Mr. Agostini, president of his company, and the work which I did as Counsel of this company back there in Washington trying to get this modification over, and finally succeeded in getting it so it was satisfactory to everybody with respect to the entire plant, I had a great deal to do with the change in attitude upon the part of the Munitions Board.

Now, if Counsel had read the entire thing about the Moore Yard in the 1949 report in which it is said to be a fine facility, one of the best, but there is an asterisk there and down at the bottom of that page is "not inspected." Somebody was just writing about it back there. It wasn't inspected. But after an inspection had been made, after it had been brought to their attention the condition of the shipyard, the policy was established by the Munitions Board, this report was filed with Congress on March 14, just 14 days after this quit claim deed as modified was executed. By that time it had changed. Everything had changed. Reading this again, it told about shipyards and their difficulties: "Recognizing that problem in connection with shipyards, most of the plants have been cannibalized of production equipment. Most of the plants have been cannibalized of production equipment" at this time. It must be that they didn't think the equipment would be useful in future emergency to build the type of ships that they designed. "And the land, docks and more adaptable buildings have been leased

to a number of tenants for a wide variety of peace time activities. This at least provides for a certain degree of maintenance and some offset of expense to the Government. A suitable modification of the Security Clause provides for recapture of the sites in the event of an emergency."

I contend that that was the theory upon which this deed was modified. The Government cared nothing about the equipment, only the Navy. I hope my friends in the Navy, of whom there are legion, will excuse me for saying that that was nothing but an exemplification of an understanding that goes into every professional service. They hoard everything. Once they get their hands on something they do not desire to turn loose, and that was the reason this was put into the hands of the Secretary of Defense.

The Court: Like the man in South Pacific, "Once you have her don't let her go." [315]

Mr. Neblett: I think that is an apt illustration, your Honor.

And it goes on, "unwarranted expense would be involved in the idle maintenance of shipyard facilities—" that is exactly what the Navy would like to have us do. I can say to your Honor, and I am not in fear of any contradiction, if the Munitions Board were here in this suit that they would stand by what is written down here, and the Navy Department really has nothing to do with it except that they are in a recommending capacity. That is what the Navy would like to have us do, just let that old stuff sit there, sink in the water, go to



pieces, worth nothing to anybody, and just let us pay taxes on it to the State and County, to the State of California and County of Alameda. Your Honor knows that from just taking judicial notice of it, of the fact that taxes ruuing over a period of ten years would be more than we paid for it.

The Court: The only answer I can make to that is, why did your client take it?

Mr. Neblett: I beg your pardon, your Honor?

The Court: The only answer I can make to that is, why did your client take the property?

Mr. Neblett: Well, they took it on the theory——

The Court: I don't mean the real estate, I mean the personal property.

Mr. Neblett: Well, why they took it was very simple, [316] because in paragraph 3 in the quit claim deed we were given the right to apply for modification of that any time, for modification or for removal of it, and we were sure when we could bring in the evidence that it should be modified, that it would be granted, and that is exactly what happened. That was a part of our contract, that we could apply at any time. We could apply next day. And we did that and they made this modification which is satisfactory to everybody.

“Assuming that there might be quite different requirements in a future emergency, considerable alteration in both layout and facilities may be required. With a suitable waterfront site available”——which it has. There was testimony this morning it couldn't be used for shipbuilding unless there was considerable revamping, which we all know——



“at least one of the major delays in establishing a shipbuilding facility will be eliminated by retention of title or lease, regardless of the disposition of buildings and equipment.”

There is another point I have referred to before, but it is something that has come up so much and seems to be in the case, that the whole Industrial Reserve is dependent upon the decision in this case. That is incorrect. The only thing involved here is the machinery and tools and equipment because the Security Commission has sustained it is just figuring on the site. What do we have now? With that lifted, eliminated from the quit claim deed in which the Security Clause in the [317] old quit claim deed provided that Security Clause would be held in the machine tools and equipment on the plant for ten years, it provided for activation of the old things. That is gone. That isn't there any more. And there is no way to activate that Security Clause with regard to the machine tools and equipment, and the Government could come in tomorrow and take over that plant if we had an emergency. Couldn't do it unless we had an emergency, but could come in tomorrow and make us move under the terms of that quit claim deed, every one of those cranes off of there. Of course the Government would pay us for moving them, but we would have to move them off. They are not useful to anybody now. Anybody knows that in modern war, if war comes, none of that stuff will ever be used again for any purpose. We heard General Bradley come out a month ago, make a speech in which he says

that. I listened to a speech by General ..... the other night in Santa Barbara and he said the same thing. I heard General Vandenberg over the radio and then Admiral Sherman's talk that none of these things will be used any more.

The Court: I am glad you mentioned an Admiral in that group.

Mr. Neblett: Admiral Sherman? I had to mention him. Because he made a remark the other day that we had a new torpedo which has a range of about sixty miles and has one of these guided fuses on it that has done away practically [318] with surface ships and we would have to go to undersea craft.

The Court: I was hoping you would mention Admiral Denfield, too, but you didn't.

Mr. Neblett: Admiral Denfield? I don't know Admiral Denfield very well. I do know Admiral Sherman very well. I hope your Honor will pardon me for making this comparison, but I think Admiral Sherman is more acquainted with modern ideas than Admiral Denfield because Admiral Sherman and I are both pilots. I am one, too. Air Forces.

The Court: I didn't want to interrupt your argument.

Mr. Neblett: You didn't interrupt me, your Honor. I am glad to have some humor injected into it. I would like to do it myself if I knew how.

Now, we have a case here that—we have a case where there is nothing that the Government could do to activate the machinery that is on that yard under this modified quit claim deed. Of course, if

you stand on the bill of sale as it was with all the Security Clause, there is nothing to activate there now. That one clause in there about resale upon which this suit is fastened is, under all the cases, invalid. And I think we were talking the other day of the case where the Federal rule applies——

The Court: You read that opinion.

Mr. Neblett: I am not going to read it. Dr. Niles Medical Society case, that has already been read.

And I close my argument and thank you very much, your Honor, for the courtesy that has been extended to us.

The Court: I have been very glad to hear you. Submitted?

Mr. Peckham: I think so.

The Court: I will take it under submission. I will keep the temporary restraining order in effect until I decide it, and I will try to decide this thing next week.

Mr. Neblett: Very good, your Honor.

Mr. Peckham: Thank you.

#### Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 320 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ RUSSELL D. NORTON,

/s/ KENNETH J. PECK.

[Endorsed]: Filed July 17, 1950. [320]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint:

Contains Exhibit 1, Exhibit 2, Points and Authorities in Support of Temporary Restraining Order and Order to Show Cause and Affidavit of John Rauly in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Temporary Restraining Order and Order to Show Cause.

Answer.

Motion to Dismiss Complaint.

Counter-Affidavit of Jules J. Agostini, Jr., in Reply to Affidavit of John Rauly:

Contains Quit Claim Deed dated June 1, 1949, Exhibit 1, Chattel Mortgage dated June 1, 1949; Exhibit 2, and Modification of Covenants and Conditions of Quit Claim Deed; Exhibit 3.

Order Denying Motion to Dismiss and Granting Motion for Temporary Injunction.

Notice of Appeal to the Court of Appeals Under Rule 73 (B).

Designation of the Parts of the Record to Be Printed on Appeal.

Points Appellant Will Make on the Appeal.

Findings of Fact, Conclusions of Law, and Interlocutory Decree of Injunction.

Counter Designation of the Record on Appeal.

Reporter's Transcripts:

Vol. I for June 16, 1950;

Vol. II for June 20, 1950;

Vol. III for June 21, 1950;

Vol. IV for June 22, 1950.

Plaintiff's Exhibits Nos. 1, 2, 3-A, 3-B, 4, 5 & 6.

Defendant's Exhibits Nos. A, B, C, D, E & F.

Court Exhibits Nos. 1 and 2.

And I further certify that on July 17, 1950, a Cost Bond for \$250.00 was filed by the Appellant with the Notice of Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of August, A.D. 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ M. E. VAN BUREN,  
Deputy Clerk.



[Endorsed]: No. 12,653. United States Court of Appeals for the Ninth Circuit. Oakland Dock and Warehouse Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 16, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 12653

OAKLAND DOCK & WAREHOUSE COMPANY,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

POINTS ON WHICH THE APPELLANT  
WILL RELY UPON ITS APPEAL

1. The Complaint does not state a cause of action for damages or for an injunction.
2. The temporary injunction is void on the face of the record. The defendant and appellant is enjoined from the sale of any machinery tools and equipment without the written consent of the Secre-

tary of the Navy. The Secretary of the Navy is a stranger to this transaction both under Public Law 883, 80th Congress, and the contracts made under it. All authority by the Act and by the contracts is vested solely in the Secretary of Defense.

3. The temporary injunction was granted for the purpose of preventing an alleged breach of contract.

4. The plaintiff and appellee is attempting to maintain this suit without using or exhausting the administrative remedies provided in the contract.

5. The covenant against resale in a bill of sale is an unlawful restraint on alienation and void.

6. The suit was brought without the consent or authorization of the Secretary of Defense.

7. The security clause, if any, upon the machinery tools and equipment was removed February 28, 1950, by modification of the clause on that date so as to eliminate the personal property from the clause.

8. There is no evidence to support the finding of fact that the covenant against resale is not void as an unlawful restraint on alienation or that such a covenant or restraint is authorized by the provisions of the National Industrial Reserve Act of 1948, 62 Statutes, 1225.

9. There is no evidence to support the finding of fact that the California law covering restraints on alienation does not control the transfer of the machinery tools and equipment involved.

10. There is no evidence to support the finding of fact that the further sale and disposition of said machine tools and items of industrial equipment will materially reduce the capacity of the plant to produce the items for which it was designed, nor is there any evidence to support the finding that such further sale and disposition of the machine tools and equipment will frustrate or subvert the public policy of the United States as embodied in the National Industrial Reserve Act of 1948 or that such sale or sales would cause irreparable or any damage to the plant.

/s/ WILLIAM H. NEBLETT,  
Attorney for Defendant and  
Appellant.

[Endorsed]: Filed October 25, 1950.

